

No. 15104

United States
Court of Appeals
for the Ninth Circuit

ORIENTAL FOODS, INC., a corporation,
Appellant,

vs.

CHUN KING SALES, INC., and JENO F.
PAULUCCI, Appellees.

CHUN KING SALES, INC., and JENO F.
PAULUCCI, Appellants,

vs.

ORIENTAL FOODS, INC., a corporation,
Appellee.

Transcript of Record

In Three Volumes
Volume II.
(Pages 273 to 537, inclusive)

Appeals from the United States District Court for the
Southern District of California,
Central Division

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(Testimony of Jaisohn Hyun.)

Q. All I am trying to do is to get this date. You said, "thereafter." What did you mean by "thereafter"?

A. I don't know how long it takes us to make distribution and fill the pipelines, and then continue to fill the [244] requirements for our orders. I would say it would be a period of 30, 60 or 90 days was the period after June, 1949, that we introduced this in interstate commerce.

Q. All right. Now, there is one additional packing carton, which has been marked as Exhibit 47, for identification. I will ask you when you adopted this particular carton?

A. This particular carton was adopted on June 29th of this year.

Q. Of 1955? A. Yes.

Mr. Lewis E. Lyon: I will ask that Exhibit 47, for identification, be received in evidence.

The Court: It may be received.

The Clerk: 47, previously identified, now admitted in evidence.

(The item heretofore marked Plaintiffs' Exhibit 47 was received in evidence.)

Q. (By Mr. Lewis E. Lyon): I place before you a carton bearing on the side "Chun King Beef Chop Suey," having a red panel, and ask you when you were first familiar with that packing case?

A. The first day this case opened in court.

Q. Is your answer the same with respect to the blue one which I have placed on top of it? [245]

A. Yes.

(Testimony of Jaisohn Hyun.)

Q. And is your answer the same with respect to the yellow one I place on top of that? A. Yes.

Q. Who does the sales work for your company? Who does the selling for your company at the present time? A. You mean our sales executive?

Q. Yes.

A. Mr. Mooney, John Mooney, our sales manager.

Q. I see. You do not do the sales work?

A. No. I perform in that field, but not predominantly.

Mr. Lewis E. Lyon: I will ask that these three cartons be marked, for identification, at this time as exhibits next in order.

The Court: All right.

The Clerk: Three empty cartons of Chun King products identified as Plaintiffs' Exhibits 49, 50 and 51, for identification.

(The items referred to were marked Plaintiffs' Exhibits 49, 50 and 51, for identification.)

Mr. Lewis E. Lyon: That is all. [246]

* * * * *

JAMES EDWARD BINGHAM

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: James Edward Bingham. [247]

* * * * *

Direct Examination

Q. (By Mr. Lewis E. Lyon): Will you state

(Testimony of James Edward Bingham.)

your full name, residence, and occupation, Mr. Bingham?

A. James Edward Bingham; Duluth, Minnesota; plant superintendent of Chun King Sales.

Q. How long have you occupied that position?

A. Since the latter part of '48, or the early part of '49.

Q. Are you familiar with the packing cartons which have been used by Chun King for packing its Chinese American foods? A. Yes, sir.

Q. Do the use of those come under your supervision? A. Partly, yes.

Q. Before you are three cartons, marked Exhibits 49, 50 [249] and 51, for identification. Can you tell me when Chun King first packed its products in those cartons?

Mr. Harris: That is objected to, if the court please, as not the best evidence, and no foundation has been laid.

The Court: Overruled. It is a preliminary question. Go ahead.

The Witness: Will you read the question, please?

(The question was read.)

The Witness: Some time between January and March, of 1954.

Q. (By Mr. Lewis E. Lyon): How do you establish those dates?

A. Those dates are established by a new product put out by Chun King at that time.

Q. What was that product?

A. That was the Cantonese divider pack.

(Testimony of James Edward Bingham.)

Q. And is that Cantonese divider pack illustrated by any of the exhibits here in evidence?

A. Yes, it is.

Q. Will you point them out? Just come down and do it.

A. Exhibit 9, Exhibit 10, Exhibit 3.

Mr. Lewis E. Lyon: That is all. Before that, I will offer in evidence at this time Exhibits 49, 50 and 51, for identification, as Exhibits 49, 50 and 51.

I will also offer at this time Exhibit 34, which is the [250] Jan-U-Wine carton, heretofore marked for identification as Exhibit 34.

I will also offer at this time Exhibit 29, which is the wire which was sent by Mr. Paulucci to the Minnesota Mining & Manufacturing Company in 1952, heretofore marked for identification as Exhibit 29.

I will also offer at this time as Exhibit 30, the letter heretofore marked for identification as Exhibit 30, which is a letter of October 16, 1951, sent to Mr. G. C. Cronin by Chun King Sales, Inc., and which the witness, Mr. Cronin, admitted receiving.

The Court: They may be received.

The Clerk: Plaintiffs' Exhibits 29, 30, 34, 49, 50 and 51, heretofore identified, now admitted in evidence.

(The exhibits heretofore marked Plaintiffs' Exhibits 29, 30, 34, 49, 50 and 51, were received in evidence.) [251]

IVAN ROBERT PETERSON, JR.

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Ivan Robert Peterson, Jr.

The Clerk: With an "o" or an "e"?

The Witness: With an "o." [252]

Direct Examination

Q. (By Mr. Harris): What is your residence, Mr. Peterson? A. Minneapolis, Minnesota.

Q. What is your present occupation?

A. Tool designer.

Q. How long have you been a tool designer?

A. Since March 1st, this year.

Q. By whom are you employed at the present time?

A. Minnesota Engineering Company.

Q. So far as you know, does that have any relation to the Minnesota Mining & Manufacturing Company? A. No, it does not.

Q. Were you ever employed by the Minnesota Mining & Manufacturing Company?

A. Yes, I was.

Q. When?

A. From January, 1949, to October, 1954.

Q. Did you ever work for that company in its tape-customer engineering department?

A. I did.

Q. And when was that?

A. From January, 1949, to late 1951.

(Testimony of Ivan Robert Peterson, Jr.)

Q. During that period did you do any work, as a part of your duties for the company, in connection with machines for [253] applying resilient sticky tapes to cans? A. Yes.

Q. Will you generally describe the work you did?

A. My assignments consisted of developing and constructing machines and fixtures for the purpose of applying tape to many objects, including cans. Generally, to develop an idea, and to construct a piece of machinery that would do the job.

Q. During that period did you ever design or work on any taping machine to be used by the plaintiff, Chun King Sales, Inc.? A. I did.

Q. Will you please generally relate the sequence of events in that work?

A. I don't recall exactly when, but it was in the latter portion of 1949 I was assigned to develop and construct a machine for taping two cans end-to-end for use at the Chun King plant. In the latter portion of 1949 or early portion—just a minute.

(Witness refers to paper.)

Would you read that back? I think I have made one mistake of date.

(A portion of the answer was read by the reporter as follows:

“A. I don't recall exactly when, but it was in the [254] portion of 1949 I was assigned to develop and construct a machine”——)

The Witness: That is sufficient. —in the latter portion of 1950 that should be.

(Testimony of Ivan Robert Peterson, Jr.)

Then in January, late January of 1951, I was instructed to go to the Chun King plant in Duluth to make final corrections and work on the operation of the machine in their plant.

Mr. Harris: I produce a drawing bearing the legend, "Tape Applying Movement, Minnesota Mining & Manufacturing Company," which I ask to be marked as defendant's exhibit next in order.

Q. While the clerk is identifying that drawing and marking it, did you have anything to do with the building of the machine that you are referring to? A. Yes, sir, I built it.

Q. Who designed it? A. I did.

Q. Where was that built?

A. In the Benz Building of the Minnesota Mining & Manufacturing Company.

Q. Where? A. In St. Paul, Minnesota.

Q. And how do you fix this date of January, 1951, that you have referred to? [255]

A. I have some personal records, some expense vouchers and things of that nature.

The Court: Just a minute.

The Clerk: A list of exhibits identified only:

Defendant's Exhibit E, United States Patent 2,679,281; Defendant's Exhibit F, Patent 921,855; Defendant's Exhibit G, Patent 1,672,839; Defendant's Exhibit H, Patent 1,939,719;

Defendant's Exhibit I, Patent 2,006,451;

Defendant's Exhibit J, Patent 2,078,227;

Defendant's Exhibit K, Patent 2,120,504;

Defendant's Exhibit L, Patent 2,307,406;

(Testimony of Ivan Robert Peterson, Jr.)

Defendant's Exhibit M, Patent 2,326,414;

Defendant's Exhibit N, Patent 2,444,830;

Defendant's Exhibit O, Patent 2,484,248;

Defendant's Exhibit P, Patent 2,502,635;

Defendant's Exhibit Q, Patent 2,587,685;

Defendant's Exhibit R, Patent 2,590,241;

Defendant's Exhibit S, Patent 2,652,166; and a drawing headed "Minnesota Mining & Manufacturing Company of a Tape Applying Movement" is identified as Defendant's Exhibit T.

(The drawings referred to were marked Defendant's Exhibits E to T, both inclusive, for identification.)

Mr. Harris: I hand this print, Defendant's Exhibit T, to counsel. I don't have any copies of that.

(The document was handed to counsel.)

Q. (By Mr. Harris): Mr. Peterson, you said that you had some personal records to establish these dates that you mentioned. Will you produce these, please?

(The documents were handed to counsel.)

Q. What are they? Will you explain what those records are?

A. I have a form, a Minnesota Mining form, semi-monthly expense voucher, which covered my expenses incurred on this January trip, and a Minnesota Mining form, "Company Business Mileage Report," covering the mileage, my personal mileage for my own automobile when I made that trip.

I have a Hotel Duluth receipt for my lodging,

(Testimony of Ivan Robert Peterson, Jr.)
and a receipt from the garage at Duluth for the service to my automobile.

The Court: What is the date? Are they all dated the same time?

The Witness: The——

The Court: Oh, I can see them when they are in. Don't bother.

The Witness: January 25th and 26th.

The Court: The year?

The Witness: 1951.

The Court: All right.

Mr. Harris: I ask that these four documents produced by [257] the witness be clipped together and be marked as Defendant's Exhibit U.

The Court: They may be received.

The Clerk: Defendant's Exhibit U, a bunch of papers dealing with expenses of Witness Peterson.

(The documents referred to were marked Defendant's Exhibit U, and received in evidence.)

[See Book of Exhibits.]

Mr. Harris: I produce a two-page document entitled, "Semi-Monthly Expense Voucher," which I ask be marked for identification as Defendant's Exhibit V.

The Clerk: Semi-monthly expense voucher marked as Defendant's Exhibit V.

(The document referred to was marked Defendant's Exhibit V, for identification.)

Q. (By Mr. Harris): Mr. Peterson, I show you

(Testimony of Ivan Robert Peterson, Jr.)

Defendant's Exhibit V, for identification, and ask you what those documents are?

A. They are thermofax copies of the originals of my semi-monthly expense voucher, and my mileage report for that same two days.

Q. Is the second page of that record in your handwriting or not?

A. Yes, it is in my printing.

Q. Were those records made by you on or about the dates they bear? [258]

A. Yes, they were. There is one correction. The name in the voucher I did not write. That is not my handwriting. But the rest of it is all mine, with the exception, of course, of the department head signature.

Q. I show you Defendant's Exhibit T, for identification. Do you recognize that print?

A. Yes, I do.

Q. What is that?

A. It is one of a series of sketches which we called schematics, illustrating and explaining various tape applying mechanisms and movements which the department had at that time, and—well, I think that is sufficient.

Q. When did you first see a print of that drawing?

A. Very shortly after it was drawn, I know that.

Q. Did you use it in any way in connection with this machine that you have referred to that you built and which was taken to the Chun King plant?

A. Very definitely. It formed essentially the

(Testimony of Ivan Robert Peterson, Jr.)

tape applying mechanism built into this particular machine.

Q. When did you say that machine was completed?

A. In the latter portion of 1950, or very early in 1951.

Q. Was it completed prior to your trip to Duluth, evidenced by these expense vouchers?

A. Yes, it was. [259]

Q. What was the occasion for that trip on January 31, 1951, to Duluth by you?

A. The purpose of the trip was to actually get the machine functioning.

Q. What did you do?

A. I traveled to Duluth, and entered the plant of Chun King Sales, made myself known, and was taken into their plant in the area where they had set up—the area they had assigned for this machine, where they had it set up, and was shown how in their course of attempting to operate the machine in their plant it would not function properly.

Q. In what respect?

A. Primarily, the main difficulty was a skidding of the tape instead of adhering to the cans. When the arm came down in contact with the cans, instead of adhering and the tape being propelled from or through the tape mechanism, the tape merely skidded on the cans, and it would not tape. Occasionally it would make a partial wrap. Sometimes

(Testimony of Ivan Robert Peterson, Jr.)
it would make a complete wrap, but most often it would skid. So I corrected that situation.

Q. How long were you there in Duluth on that occasion?

A. One or two days. I left for Duluth one day, and I came back the next.

Q. Was there any other equipment being used at that time in the Chun King plant for taping cans together end-to-end? [260]

A. Yes, there was.

Q. What was it?

A. It was a jig. I shouldn't say a jig,—there were jigs set up for a hand operation to do this same job.

Q. What did those jigs consist of?

A. Essentially, a tape dispenser and a piece of angle iron mounted to a base.

Q. Were they set up in a production line?

A. Yes, I would call it a production line.

Q. Where was this machine that you were referring to, with reference to these jigs?

A. Well, right in the same area.

Q. What did you do to the machine to put it in operation?

A. Well, actually several adjustments were required, and several bugs had to be taken out of the machine, as we say. Primarily, the big cause of the skidding was a slightly greasy condition of one of the cans, and in order to counteract that, it was necessary to provide a means of presenting some slack to the tape applying mechanism, so that the

(Testimony of Ivan Robert Peterson, Jr.)

cans would have a chance to get a start and overcome the inertia of the tape applying mechanism.

Also, another point that was discovered was that the resiliency or the durometer of the rubber rolls, the foremost rubber roll or buffing roll—or, rather excuse me— [261] the applying roll was too hard, and that had to be changed so that it would be more resilient, and adhere the tape to the cans better.

Q. Did you make that change?

A. Yes, I did.

Q. Do you recollect any other changes that you made?

A. There could have been others, minor adjustments and things of that nature, that I don't recall now.

Q. When you left the Chun King plant at that time, what was the condition of the machine that you were referring to? A. It was operating.

Q. Operating for what purpose?

A. For taping cans together.

Q. In what relationship? A. End-to-end.

Q. And what was happening to the cans that were coming out of that machine so taped?

A. Well, they were being packed in cartons.

Q. Separate from the hand operation, or together with the product of the hand operation?

A. Actually, they were being packed right along with the hand production line cans. There was no attempt to segregate them.

Q. Did you make any further trip to the Chun

(Testimony of Ivan Robert Peterson, Jr.)

King Sales [262] Company after this trip which you have mentioned? A. Yes, I did.

Q. Approximately when was that?

A. In April, of 1951.

Mr. Harris: I produce a further semi-monthly expense voucher, consisting of two sheets, which I ask be marked as defendant's exhibit next in order.

The Clerk: Semi-monthly expense voucher, April 1951, identified as Defendant's Exhibit W.

(The document referred to was marked Defendant's Exhibit W, for identification.)

Mr. Harris: I exhibit this to counsel.

(The document was handed to counsel.)

Q. (By Mr. Harris): Mr. Peterson, I show you Defendant's Exhibit W, for identification. What are those two records?

A. They are thermofax copies of the expense voucher and mileage report that I turned in to cover the April trip.

Mr. Harris: These expenses vouchers, if the court please, are offered into evidence as Defendant's Exhibits U, V and W, respectively.

The Court: They may be received.

The Clerk: Defendant's V and W admitted in evidence. Defendant's Exhibit U previously admitted.

(The documents heretofore marked Defendant's Exhibits V and W were received in evidence.)

[See Book of Exhibits.] [263]

Mr. Harris: And the drawing, which is Exhibit

(Testimony of Ivan Robert Peterson, Jr.)

T, is offered into evidence as Defendant's Exhibit of the same number.

Mr. Lewis E. Lyon: The drawing is objected to on the ground it has been neither properly proven nor identified.

The Court: What is it?

Mr. Lewis E. Lyon: It is a sketch. The witness said he saw it, and that is all.

The Court: What is that?

Mr. Lewis E. Lyon: He said it is a sketch that he saw.

Mr. Harris: He said he used it, if the court please, in designing the first machine.

Mr. Lewis E. Lyon: He did not so testify.

The Court: That is fine. Let's have him identify it further. Just tell us about this, what this is, and who made it, and when you saw it.

The Witness: It is a drawing of a tape applying movement or mechanism. It was used by me in developing and building this particular machine, and other machines.

Q. (By Mr. Harris): By "this machine," what do you refer to?

A. The machine for taping two cans together end-to-end for Chun King Sales.

The Court: Were you here when that machine was exhibited the other day? [264]

The Witness: Yes, your Honor.

The Court: Was that the machine you were talking about?

The Witness: No, your Honor, it was not.

(Testimony of Ivan Robert Peterson, Jr.)

The Court: Was it one similar, operating in a similar fashion?

The Witness: Yes, your Honor, it was similar.

The Court: Similar. The machine that they showed was not your manufacture?

The Witness: No, your Honor, it wasn't.

The Court: All right. I think a sufficient foundation has been laid for this. It may be received.

The Clerk: Defendant's Exhibit T admitted in evidence.

(The document heretofore marked Defendant's Exhibit T was received in evidence.)

[See Book of Exhibits.]

Q. (By Mr. Harris): Mr. Peterson, did you have occasion to examine the defendant's machine, which was marked as Plaintiffs' Exhibit 21, for identification, and which was here in court the other day, while it was here? A. Yes, I did.

Q. In fact, you made some of the repair on that machine after it failed to operate, did you not?

A. Yes, I did.

Q. Will you please compare the construction of the machine that was here in court, Plaintiffs' Exhibit 21, for identification, with the machine that you designed and built [265] and set up at Chun King Sales, as you testified? [266]

* * * * *

Mr. Harris: Your Honor, may I say this: This machine that was here in court, that the defendant uses, is not built by the Minnesota Mining.

The Court: I know that. [270] * * * * *

(Testimony of Ivan Robert Peterson, Jr.)

Mr. Lewis E. Lyon: Your Honor, I object to that question on the ground there is no foundation laid.

The Court: I will tell you what I will do. I don't know this man, and I don't know what mechanical background he has had.

In the case of the other witness from the Minnesota Mining Company, who was their salesman, I declined to allow him to make a comparison with something which was not before the court, as to which he could not be properly cross examined, which the court could not see himself for purposes of visual comparison, because the court does not need an expert to compare ordinary machinery, and, to be consistent, I will make the same ruling.

However, I will allow you to show that this man is a draftsman, or an engineer, or a mechanic, and has special knowledge to enable him to make the comparison. Otherwise, I will rule the same as I did in the case of the salesman.

Mr. Lewis E. Lyon: Just a moment. The point of my objection is, your Honor, that the machine, if it is in existence, is the best evidence.

The Court: No, that does not make any difference. You see, I don't agree with you either. You go to one extreme, and he goes to the other. I stand in the middle, and, as I said before, a man may compare a machine even though it is not before us. In this case he would compare something [273] that was before us with something that is not. If he has such knowledge, that he can make a comparison,

(Testimony of Ivan Robert Peterson, Jr.)

at least one of them is here. The reason I declined to have the other witness make a comparison was because he was a salesman and could not read a case of blueprints. This man has produced blueprints, which he has stated represent a machine of a certain type, and he may have the adequate knowledge to make the comparison.

Go ahead.

Q. (By Mr. Harris): Mr. Peterson, will you please review for the court your experience in machine design, drafting, tool engineering and tool design? A. Well, that goes back quite a ways.

The Court: That is all right. Tell us your education.

The Witness: Actually, I prepared myself during high school for an engineering education. During my period between high school and military service, I worked in mechanical lines as a tradesman.

Q. (By Mr. Harris): As what?

A. As a welder. During my service in the Army, I had one refresher course and one full term in A.S.T.P., which was the Army's Specialized Training Program, and that course was in basic engineering.

When that program was discontinued, I was transferred to ordnance, and spent the rest of my Army career as a mechanic [274] welder in armored ordnance.

Upon discharge from service, I went into welding, and eventually went into production line work on presses, metal forming presses, and spent a year

(Testimony of Ivan Robert Peterson, Jr.)

in production,—various production jobs on a——

Q. What do you mean by production jobs? Do you mean putting the things through production?

A. No, actually it amounted to tooling and setting up production.

The Court: I was going to use that very word, because we know what tooling is, that that is to set up machines to make various things. Is that what you mean?

The Witness: Yes, your Honor.

The Court: I see. All right.

The Witness: Then in January of 1949 I went to work for Minnesota Mining in the tape-customer engineering service, initially as a draftsman, and worked on up to machine designer.

Now, in that particular group, a machine designer actually made his own sketches, worked from them, built the machine, developed it, and put it in proper operating condition.

The Court: In other words, you are not merely a theoretical man, who prepared the sketches for somebody else to embody into an instrument or machine, but you did the [275] embodying, too?

The Witness: Yes, your Honor.

The Court: I am satisfied with that background that the answer may be given. [276] * * * * *

The Witness: Essentially, they are the same in principle. The major difference, of course, is that the machine which I constructed and worked on was not as rugged as this one. It was not built as heavy, let's put it that way.

(Testimony of Ivan Robert Peterson, Jr.)

It was constructed from the floor or the ground up, and it just grew actually piece by piece, and as they dropped into place, they eventually reached a point where they performed the function.

Do you wish to have me compare minor differences in the construction of these machines?

Q. (By Mr. Harris): Well, you might first compare the similarities, the basic similarities in the machines.

A. Essentially, they both consist, first, of a means of rotating or propelling the cans, with suitable timing devices to tie in a tape applying mechanism, so timed that it will start, wrap, and sever the tape, and then eventually eject the cans.

They both are similar in their taping mechanism, with minor differences. The principle of the taping mechanism in both was the same. The drive and propelling mechanism is essentially the same in both machines.

Q. In this machine used at Chun King, that you testified to, did that have any means for controlling the tension of the tape during application of the cans?

Mr. Lewis E. Lyon: Your Honor, that is objected to as [277] leading. The witness has not said that it had any tension.

The Court: Yes. He is an expert. You cannot lead him.

Q. (By Mr. Harris): Will you compare the tape applying mechanism of that machine that was

(Testimony of Ivan Robert Peterson, Jr.)

used at Chun King with the machine, Exhibit 21, that was here in court?

Mr. Lewis E. Lyon: That has already been done, your Honor.

The Court: I beg pardon?

Mr. Lewis E. Lyon: I say I object to the question on the ground that the ground has already been covered.

The Court: Go ahead. Let's find out.

The Witness: Well, they both consist, first, of a tape core mounted on a shaft, a fixed shaft. From there the tape progresses to a knurled or serrated roller, a grooved roller, with a non-backup principle or overrunning clutch principle, and thence to the applying roll.

All of these elements are mounted on one arm.

Then a secondary arm, containing a buffing roller, and a severing knife.

Q. (By Mr. Harris): And what was the function of the applying roller, first of all?

A. To initially adhere the tape to the can or object being taped.

Q. And then what happened?

A. Then, through the timing of the machine, the cans [278] were clamped actually in an actual relationship, rotated, and in so doing propelled the tape, and were buffed by the buffing roller on the cans, on the beads of the cans, and the cycle was complete when a little over-wrap was applied.

The can would retract the arm bearing the tape roll and the applying roll, and the clutch, and it

(Testimony of Ivan Robert Peterson, Jr.)

was so constructed that it made a portion of travel, a portion of arc, before it in turn actuated the other lever containing the buffing roll and the knife, and in so doing, caused a displacement between them, shearing the tape on the knife, severing the tape, after which the cans were, through the timing of the machine, the cans were unclamped, and subsequently ejected from the machine.

Q. What was the condition of the tape, as it was being applied to the cans, with the rotation of the cans? A. Under tension.

Q. And how does that compare with the machine we had here in court, Plaintiffs' Exhibit 21, for identification? A. The same.

Q. Now, was this machine that went up to Chun King Sales, as to which you testified, was that a toy? A. No, definitely not.

Q. What was the purpose of that machine?

A. The purpose of the machine was to prove a principle, prove that the job could be done in this manner. [279]

Q. Did it do so? A. It did, yes.

Q. Did you ever seen any cans of food taped together in actual markets or stores, which had been taped by this particular machine that you are referring to?

A. Yes, in my opinion, I have.

Q. Where and when did that occur?

A. Well, it happened some time later—it would be very difficult to fix any sort of date on that—in

(Testimony of Ivan Robert Peterson, Jr.)

the presence of my wife, in the course of a shopping expedition. Frankly, I looked for it.

Q. Why?

A. Well, because I was interested. I wanted to see evidence of the use of the machine.

Q. By whom? A. By Chun King.

Q. And what did you see?

A. And I found cans which I very definitely believe were taped on the machine, because they bear the unmistakable mark of my machine in the method of severance of the tape.

Q. What do you mean by the method of severance of the tape?

A. Well, the particular knife that I had on my machine differed from the type that you saw here in court on the machine, in that it was a single point knife, with an [280] approximate included angle of about 90 degrees, I would say. I couldn't fix it any closer than that, but it would leave a very definite "V" in the end of the tape, the trailing end of the tape, as we say, or the final bit of tape that was buffed down on the cans.

Q. Where did you see those cans?

A. I don't really know which store it was in, but—well, I could guess, but I don't know for sure.

Q. An ordinary commercial sale, was it?

A. Yes.

Q. Did you ever have any discussion with anyone at Chun King Sales, Inc., while you were there on either of these visits, as to putting tension on the tape as it was being applied to the cans?

(Testimony of Ivan Robert Peterson, Jr.)

A. Would you repeat that, please?

(The question was read.)

A. Yes.

Q. Will you relate what happened on that?

A. Well, this discussion was actually with the girls working on the hand line, actually applying the tape.

Q. What do you mean by the hand line, first of all?

A. Well, they were working right alongside of me. They were taping cans in the jigs that they had there by hand.

Frankly, most of them weren't very receptive to the machine, [281] and there was, oh, a sort of ill-feeling to overcome, you might say—I don't know, maybe—they, of course, had tried the machine, and they had not been able to operate it to function properly.

Q. In what respect? A. Pardon?

Q. In what respect didn't it operate properly?

A. Well, as I recounted before, you couldn't trip the machine, to be sure that you would get a finished pair of cans afterwards, because there was a lot of skidding of the tape. That was the primary trouble.

Q. What was said about this business of applying tape under tension?

A. Well, they made comparisons of their end product with my end product.

Q. By "their end product," you mean what?

A. By their hand taped combination of the two-can combination. I realized, of course, that it would

(Testimony of Ivan Robert Peterson, Jr.)

be up to me to duplicate, as nearly as possible, if I could, their end product.

Q. What was the condition of their end product? Did you examine it at that time? A. Yes, I did.

Q. What was the condition of the tape on the cans at that time,—on the cans which they had taped by hand? [282]

A. It was stretched on the bead in order to conform to the bead.

Q. Did you try to get your machine to do the same thing? A. Yes, I did.

Q. And did you accomplish that?

A. Yes, I did.

Q. While the machine was there at the Chun King plant; is that it? A. Yes.

Q. After this second visit of yours to the Chun King plant in April of 1951, when did you next see, if ever, that particular machine?

A. I never did.

Q. Do you know what happened to it?

A. No, I don't.

Mr. Harris: You may cross examine.

Cross Examination

Q. (By Mr. Lewis E. Lyon): Mr. Peterson, as I understand your testimony, you made a machine and took it down to Chun King?

A. I did not take it down.

Q. Or, it was taken down, it wouldn't work, and you went down and made some tests of this machine, which was made for [283] the purpose of trying to

(Testimony of Ivan Robert Peterson, Jr.)

test, as you say, a principle to see if the principle would work; is that correct?

A. Well, I don't go along with your terminology in the use of the word "test."

Q. What else did you do besides a test?

A. I didn't test the machine. I adjusted it, and made it work, and then left.

Q. I see. And the purpose of that machine was, as you testified, to try to test a principle, wasn't it?

A. To prove a principle, I said.

Q. All right, to prove. And it was experimented with to see if the principle would work, wasn't it?

A. Yes.

Q. All right. Then, to your knowledge, the Minnesota Mining & Manufacturing Company, while you were still there, tried to make a second machine, which would work, and delivered that to Chun King, didn't they?

A. I have no knowledge of that.

Q. You have no knowledge of it at all?

A. None whatever.

Q. You were never there after April?

A. I left that department in the latter part of 1951, and have no knowledge of any second machine.

Q. You were still in that department in September of 1951, were you not? [284]

A. I can't recall the exact date when I left.

Q. All right. Were you, or weren't you there on September 13, 1951? A. In that department?

Q. Yes. A. I do not know.

(Testimony of Ivan Robert Peterson, Jr.)

Q. Did you ever see—who was your immediate superior? A. Immediate superior?

Q. Yes. A. Walter Aldrich.

Q. Did you know an L. S. Mercer, Jr.?

A. I have heard the name Bud Mercer, I think.

Q. Wasn't he the manager of the sales department of Minnesota Mining & Manufacturing Company, in which department you were working?

A. I was not working in sales.

Q. This so-called experimental department was maintained by sales, wasn't it?

A. Yes, it was. However, I had no direct, or very little direct association with the sales department.

Q. And you have no knowledge whatsoever, although you were with Minnesota Mining & Manufacturing Company until when?

A. I was with Minnesota Mining until October of 1954.

Q. And you never had any knowledge of the fact that someone tried to make a second machine; is that correct? [285]

A. No, I didn't have any knowledge.

Q. Never heard of it?

A. Not to my knowledge, no.

Q. And although you were in the same department until the latter part of 1951, as you have testified, you know nothing of any attempt to build a second machine prior to September of 1951?

A. No.

Q. Never heard of it? A. No.

(Testimony of Ivan Robert Peterson, Jr.)

Q. Did you ever see or hear of this letter, written by Mr. Mercer of Minnesota Mining & Manufacturing Company, of September 13, 1951, to Mr. Paulucci, and which says, "and of the fact that our machine is not performing satisfactorily"?

A. No, I have no knowledge of this letter, and I have never seen it. I didn't know that it existed.

Mr. Lewis E. Lyon: The letter referred to I will ask be marked for identification as the plaintiffs' next in order. It is now Exhibit D-2 to the deposition of Jeno Paulucci, taken May 23, 1955.

The Clerk: You want this numbered as a defendant's or a plaintiffs' exhibit?

Mr. Lewis E. Lyon: As Plaintiffs' 52.

The Clerk: Plaintiffs' Exhibit No. 52 is a letter from Minnesota Mining & Manufacturing Company, dated September 13, [286] 1951, to Mr. Jeno F. Paulucci.

(The document referred to was marked Plaintiffs' Exhibit 52, for identification.)

Q. (By Mr. Lewis E. Lyon): Did the Minnesota Mining & Manufacturing Company send you out here?

A. The Minnesota Mining & Manufacturing Company what?

Q. Yes. A. Pardon me?

Q. Did they send you out here?

A. They asked me to come, yes.

Q. And they paid your expenses, didn't they?

A. Yes.

(Testimony of Ivan Robert Peterson, Jr.)

Q. As a matter of fact, you know that they are conducting the defense of this action, don't you?

A. Pardon me?

Q. I say, you know that they are conducting the defense of this action, don't you?

A. I have no such knowledge.

Q. How did they come to contact you to come out here?

A. By phone.

Q. When?

A. Monday afternoon.

Q. What Monday?

A. This last Monday afternoon.

Q. That is the 21st of this month? [287]

A. Yes, I believe it was.

Q. And they told you to fly out that day?

A. Yes.

Q. And you are not in their employ?

A. No, I am not.

Q. Or in any company related to them?

A. No.

Q. Are they paying your time out here?

A. Yes, they are.

Q. And your expenses?

A. Yes.

Mr. Harris: May I see that letter, counsel?

Mr. Lewis E. Lyon: You have seen it, and you have got a copy of it.

Mr. Harris: I thought you were having it marked for identification.

Mr. Lewis E. Lyon: It was in Paulucci's deposition, when you were present, or I would have shown it to you.

(Testimony of Ivan Robert Peterson, Jr.)

Q. I note on the face of this drawing, Exhibit T, that it states that the drawing was made by a Mr. Johnson. Do you know a Mr. Johnson?

A. Yes, I do.

Q. Did he work with you on this project?

A. This particular Mr. Johnson?

Q. Yes. [288]

A. He didn't work with me on this project. He was in the department at the time, and, naturally, gave me counsel relating to his principle here, when I was using it in the machine.

Q. I see. You say this was his principle, and not yours; is that it? A. That is right.

Q. Now, you are familiar, are you not, with Exhibit S?

Mr. Lewis E. Lyon: Will you give it to me, please, for identification?

(The document was handed to counsel.)

Q. —a copy of which I will place before you, being letters patent No. 2,652,166.

A. Yes, I am familiar with it.

Q. And you have studied that patent?

A. Yes, I have read it through and looked it over, yes.

Q. When?

A. Within the past three or four days.

Q. How does the drawing, Exhibit T, differ, if at all, from the structure illustrated and described in Exhibit S?

A. I would say they are very similar.

Q. Well, this word "similar" can cover a multi-

(Testimony of Ivan Robert Peterson, Jr.)

tude of sins. In what respect is it similar, and in what respect is it dissimilar? [289]

A. Well, the principal difference is merely in the method of labeling the parts.

Q. As far as the parts that are pictures are concerned, your statement then is that they are identical; is that correct?

A. I wouldn't say either that they are identical. I would have to have a longer time to actually compare them. I would say that the order on it—they are very, very similar.

The Court: There is an entire difference when you talk architecturally, or from the standpoint of mechanical drawings between similarity and identical, is there not?

The Witness: Yes, your Honor.

The Court: "Identical" means they are exactly alike, and "similar" means they look like the other and they may function entirely differently; isn't that true?

The Witness: Yes, your Honor.

The Court: If you said the drawings of the two machines are identical, you mean that so far as they reproduce the structures, they are the same and, of course, you would imply that they perform their function in the same manner, but if you say they are similar, there may be very slight or very great variations; isn't that true?

The Witness: Yes, your Honor.

The Court: But all you say is they are similar, but they [290] are not identical; is that it?

(Testimony of Ivan Robert Peterson, Jr.)

The Witness: Well, to me the word "identical" means you could lay one on top of the other, and look at them through the light, and they would absolutely coincide, and they are not that.

The Court: They are not. That is what I gather from your distinction.

Q. (By Mr. Lewis E. Lyon): And as far as their similarities and dissimilarities, you are not prepared to point those out; is that correct?

The Court: The witness said, in fairness to himself, that he is not that kind of lightning.

Mr. Lewis E. Lyon: No, but he said he has read this in the last two or three days, your Honor, and studied it.

The Court: He said he is not prepared unless you gave him time.

Mr. Harris: I have no objection to his answering that, if he can.

The Court: It is the hesitancy of the witness that I am trying to protect.

Mr. Harris: I know, but I don't think he needs your protection on this point, your Honor.

The Court: All right.

The Witness: I have an aversion to making a dogmatic statement about mechanics. [291]

The Court: That shows an intelligent mind and a scientific mind. I wish it were more common. Unfortunately, it isn't. Too many people become dogmatic.

The Witness: Thank you.

The Court: Let's do this. We have been going

(Testimony of Ivan Robert Peterson, Jr.)

for an hour and fifteen minutes without interruption. Suppose we call a short recess, and you see if in ten or fifteen minutes of analysis you can answer the question. If at the end of that period you still say you don't want to, I will tell the attorneys that you need not answer. Is that all right?

The Witness: Very good.

The Court: All right. Then let's have a short recess.

(A short recess.)

The Court: Let's go on, gentlemen. Have you looked at those?

The Witness: Yes, your Honor.

The Court: Are you ready to answer?

The Witness: Yes, I believe I am.

The Court: All right. Go ahead.

The Witness: Your question was if they were identical; was that it?

Mr. Lewis E. Lyon: Yes.

The Witness: In my opinion, the two mechanisms depicted here are in principle identical, yes, and will produce identical [292] end product.

Q. (By Mr. Lewis E. Lyon): In function, are they identical?

A. In my opinion, they are, yes.

Q. Is that same answer true with respect to the machine which was here in court, Exhibit 21, for identification, is that identical with what is shown in this Johnson patent, and in the machine shown in this drawing, Exhibit S—or Exhibit T, is it?—Exhibit T?

A. In function, yes.

(Testimony of Ivan Robert Peterson, Jr.)

Q. Are they identical in parts?

A. No, they are not identical in parts.

Q. Are they identical in mode of operation?

A. In mode of operation,—to what do you refer?

Q. The way they produce the results.

The Court: Functionally.

The Witness: Well, in both of these mechanisms there is no actuating mechanism involved. There is a lever here, and that is all. To that extent, they both have a lever.

Q. (By Mr. Lewis E. Lyon): Now, in the Johnson patent, the part that you were referring to, and the only part of that patent—and by the Johnson patent, I am referring to Exhibit S, for identification, Patent No. 2,652,166—the only part of that patent that deals with a machine for applying tape to cans is Figures 4, 5 and 6, is it not, and [293] the specification with respect to that part?

A. Well, Figure 2 also depicts a mechanism for applying to cylindrical objects, one of which could be a can, so that I could say that 2—

Q. 2, 4, 5 and 6?

A. —4, 5 and 6 apply to cylindrical objects.

Q. All right. Now, I am going to refer you to the photographs of Exhibit 21, for identification, a machine which was demonstrated here in court, and for the moment particularly to Exhibit 21-C.

In this Exhibit 21-C there is a long mirror surface, in that it is very bright, roller, under which the tape is first trained, and which is journaled on a shaft at the top of the painted arm, to which the

(Testimony of Ivan Robert Peterson, Jr.)

tag bearing the number 21 is secured by string; that is correct, is it not?

A. I didn't get the question. Now, with all of the description, I missed the question.

The Court: Read the question, Mrs. Zellner.

(The question referred to was read by the reporter as follows:

"Q. All right. Now, I am going to refer you to the photographs of Exhibit 21, for identification, a machine which was demonstrated here in court, and for the moment particularly to Exhibit 21-C.

"In this Exhibit 21-C there is a long mirror surface, [294] in that it is very bright, roller, under which the tape is first trained, and which is journalled on a shaft"—)

The Witness: That is far enough. Yes.

* * * * *

Q. (By Mr. Lewis E. Lyon): Will you mark on Exhibit 21-C the roller to which we have referred by the letter "A", with a [295] lead line?

(The witness does as requested.)

Q. Now, will you point out to me in Exhibit S, for identification, Patent No. 2,652,166 a roller which is like——

A. One which will perform that function?

Q. ——is like the roller "A" in Exhibit 21-C?

A. I will point out a portion of it, depicting or representing such a pin, or roller, or device.

Q. In figures 2, 4, 5 and 6 which relate to a device for taping cans? A. No.

(Testimony of Ivan Robert Peterson, Jr.)

Q. There isn't any such, is there?

A. Not in those particular views, no.

Q. Nor is there one like this roller "A" in Exhibit T, is there? A. No.

Q. All right. Now, will you point out in Figures 2, 4, 5 or 6 of Exhibit S, for identification, any part which corresponds with the tension ratchet which I am going to mark "B" on Exhibit 21-C?

A. Well, in Figure 2, detail 33; in Figures 4, 5 and 6, detail 73.

Q. The patent says that the part 33 is a second roller. Does that correspond with the ratchet which I have marked "B" on Exhibit 21-C? [296]

A. I am sorry. I misunderstood, then, in your question. I thought you meant the roller.

No, we don't find any such similarity.

Q. All right. Now, in the machine which was demonstrated here in court, the roller, which I will mark "C" in Exhibit 21-C is longitudinally slightly spirally serrated; is it not? A. Yes.

Q. Do you find any such serrations pictured or described in the patent, Exhibit S, for identification, in either Figures 2, 4, 5 or 6, or in the specifications? A. No.

Q. In the machine which was demonstrated here in court, bearing on the ratchet, which we have previously marked "B," is a tension applying spring "D," which I have marked "D" on Exhibit 21-C, which applies tension in the ratchet mechanism previously marked "B." Do you find any such part described in Exhibit S, or pictured therein?

(Testimony of Ivan Robert Peterson, Jr.)

A. No.

Q. Do you find any such part in the drawing which you have identified as Exhibit T? A. No.

Q. Do you find any ratchet at all in Exhibit T, the drawing? A. No.

Q. Do you find any serrated roller in the drawing, [297] Exhibit T? A. No.

Q. In the photograph—I mean, in the machine which was marked for identification Exhibit 21, and which was demonstrated to the court, there was included a pair of grooved rollers, which I will mark E-1 and E-2 on the photograph, Exhibit 21-C for identification, and those grooves passed over the beads of the can; that is correct, is it not?

A. Yes, I believe they did.

Q. All right. Now, do you find any such grooved rollers in either Exhibit T or Exhibit S?

A. Well, the plan view could very hardly show that groove.

Q. Then your answer is “No,” isn’t it?

The Court: Well, so far as is shown there?

The Witness: Yes. A roller in this case or a figure of three-dimensions is represented by a flat plain surface. It cannot show any such groove. I don’t see any.

Q. (By Mr. Lewis E. Lyon): It doesn’t show it, then, does it? A. No.

Q. In either of them? A. No.

Q. And it is not shown in the patent, Exhibit S, is it? [298]

(Testimony of Ivan Robert Peterson, Jr.)

A. To my knowledge, it is not. I haven't found it in there.

Q. Now, as an engineer, you recognize the principle that if you want to increase the tension required to pull a tape or a string in tension, you will cause that string to pass through a circuitous route, will you not?

A. It could be accomplished by that means, yes.

Q. And that is what is accomplished, is it not, by the addition of this roller "A" to the machine shown in Exhibit 21-C?

A. Very definitely not. That is a pre-stripping roll.

Q. The tape passes around that roller in a circuitous route, does it not? A. Yes.

Q. And it passes out of the straight line of tension, does it not? A. Yes.

Q. And the result of that will be to cause more tension to be required to pull the tape around the corner, isn't it?

A. It would have that result, yes, in addition to others.

Q. In the drawing, Exhibit T, before you, you have defined the upper roller, which on the drawing is entitled "buffing roller" as having the purpose to buff the tape to the object; is that correct?

A. Correct. [299]

Q. And that is what is defined for that roller in the Johnson patent, Exhibit S, for identification, is it not?

A. The terminology is different actually in the

(Testimony of Ivan Robert Peterson, Jr.)

patent than it is in the schematic drawing. The term "buffing" is not used.

Q. Is that the same purpose?

A. Yes, I would say so.

Q. What do you mean by "buffing"?

A. To—in this case it means to place the tape in more intimate contact with the object being taped.

Q. And that would be with the periphery of the beads, would it not?

A. In this particular application, yes.

Q. Now, the purpose of this so-called applying roller, which is the roller immediately below the buffing roller, is twofold, is it not: One, to apply the first portion of the tape to the beads of the can, and the other is to function with relation to the buffing roller and the knife to sever the tape at the end of the taping operation? A. Yes.

Q. Does it have any other function?

A. Well, it will perform a secondary function, in that it will also buff, or help to cause a better contact of the tape to the object.

Q. Any other function? [300]

A. None that I can see.

Q. You say that this light weight machine that you tested at the Chun King plant was returned to Minnesota Mining & Manufacturing Company. Do you know when?

A. I never said that, because I don't know that it ever was.

Q. You don't know what happened to it?

(Testimony of Ivan Robert Peterson, Jr.)

A. No, I don't.

Q. You don't know whether it was junked?

A. No.

Q. Returned? A. No.

Q. Or thrown away? A. No, I don't.

Q. You know that it was not intended to be a commercially operating machine, do you not? It was merely a test machine, was it not?

A. In intention—personally, I don't believe it was intended.

Q. It was merely a test machine, wasn't it?

A. Well, test is——

Q. A try-out machine, if you don't like the word "test"? A. Or a "proof," yes.

Mr. Lewis E. Lyon: Or an experiment?

The Court: Do you like "experiment" better?

The Witness: Well, yes, I believe it was.

The Court: Well, give us your own synonym.

The Witness: Well, I prefer the term "pilot machine."

The Court: "Pilot"?

The Witness: Yes, a pilot production machine.

Mr. Lewis E. Lyon: And in engineering——

The Court: Frankly, I haven't heard that.

Q. (By Mr. Lewis E. Lyon): In engineering parlance, a pilot and experimental machine are synonymous, are they not?

A. Very definitely not.

The Court: What is a pilot machine?

The Witness: A pilot machine is constructed for the purpose of doing production on a very limited

(Testimony of Ivan Robert Peterson, Jr.)

or small scale, to, in many cases, even prove a product or a principle, or to determine if a principle is sound production-wise, a pilot run.

Q. (By Mr. Lewis E. Lyon): And what is an experimental machine produced for?

A. For research, actually.

Q. To try out a principle and see if it will work, and see if it could be made to operate, isn't it?

A. Yes, but with no intent of producing pilot production on it.

Q. Do you know why you were taken off of this [302] development by Minnesota Mining & Manufacturing Company, and it was turned over to someone else?

A. Well, I don't think it was ever a case of my being taken off. In the meantime, I had taken on other assignments, and, like I say, later that year I left that particular department also.

Q. You had no contact at all with the machine which is referred to in this letter of September 13, 1951, did you?

A. Is that the letter that you showed me?

Q. Yes. A. No, I had no knowledge of that.

Q. So, taking that as a fact, you know that there was a second machine made, don't you?

A. Taking what as a fact?

Q. What is stated in the letter from the company that you were employed by, in the letter of September 13, 1951.

A. I may assume it. I don't know it.

Q. You have no explanation for the fact that

(Testimony of Ivan Robert Peterson, Jr.)

you had nothing to do with any second machine, is that correct, if there was one?

A. That is correct.

Q. In 1952 did you have any contact with the Chun King organization? A. In 1952?

Q. Yes. [303]

A. Well, the only other contact I ever had there was once when my wife and I were on vacation in Duluth, I stopped in at their new plant. I had heard about their move at the time I was up there in '51 in the Lake Street plant, and I stopped in at that time. I don't recall who it was I met. It was possibly Mr. Bingham, or else the other gentleman whom I met on the earlier trips, and whose name slips me now.

Q. Was that Mr. Johnson?

A. The only one I can recall is Ed.

Q. Ed Johnson, was it not?

A. I can't recall what his last name was. They were then just in the process of setting up the place, and every one was so busy that we looked around a little bit, and then left.

Q. And there was no machine, similar machine, at the plant that you saw at that time?

A. Not that I can recall, no. [304]

* * * * *

ORVILLE MARTIN JOHNSON

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

(Testimony of Orville Martin Johnson.)

The Witness: Orville Martin Johnson.

The Clerk: Spell the first name, please.

The Witness: O-r-v-i-l-l-e.

The Clerk: And the Johnson with an "o"?

The Witness: Right.

Direct Examination

Q. (By Mr. Harris): What is your residence, Mr. Johnson? A. St. Paul, Minnesota.

Q. What is your present occupation?

A. I am an engineer at Minnesota Mining & Manufacturing Company.

Q. How long have you been employed by Minnesota Mining & Manufacturing Company?

A. For five and a half years.

Q. What is your technical educational background?

A. In December of 1948 I graduated from the University of Minnesota, after spending four years there, as a mechanical engineer.

After that I spent one and one-half years as a draftsman [305] at the Grayco Company, Minneapolis, Minnesota.

For the next five and a half years I have been a mechanical engineer at Minnesota Mining.

Q. In what department are you employed?

A. The tape-customer engineering department.

Q. And have you been in that department since you first went with the company?

A. Yes, I have.

(Testimony of Orville Martin Johnson.)

Q. Just, in a general way, state what your experience has been in that department.

A. For the first two and a half years I was a machine designer. I was given projects and asked to design and develop machines and fixtures for automatically or semi-automatically applying tape to our customers' products.

Q. What kind of a tape was this?

A. Pressure sensitive tape.

Q. Is there any other name for that you have heard used?

A. Well, since this trial began I have heard of this resilient and tacky tape.

Q. Then will you go on with your experience in that department?

A. For the next three years I have been acting as a field engineer and working on tape applying problems directly for our tape customers.

Q. As a part of your duties in the general operation of [306] your department, do you try to keep track of all tape applying machines that have been sponsored by your department which are in use throughout the country?

A. Yes, I do.

Q. Do you know of any machine for applying tape to hold two cans together in end-to-end relationship in the State of California, other than the defendant's machine, Exhibit 21, that was here in court?

A. No, I don't know of any other machine.

Q. Are you familiar with that machine that was here in court, Exhibit 21?

A. Yes, I am.

(Testimony of Orville Martin Johnson.)

Q. When did you first become familiar with that machine?

A. The specific machine that was here?

Q. Yes, the specific machine that was here.

A. I saw that machine for the first time in the Summer of 1954.

Q. And what was the occasion for that?

A. It had been sent to Oriental Foods several months prior to that time.

Q. By whom?

A. By Dellenbarger Machine Company of New York, and shortly after it was sent to Oriental Foods, Oriental encountered a few minor adjustment problems, and they were unable to cope with them successfully, so we suggested they return [307] it to St. Paul, so that we could make adjustments on the machine and make it function properly.

Q. And was that done? A. Yes, it was.

Q. And while the machine was here in court, did you have occasion to again examine the machine?

A. Yes, I did.

Q. How long have you been familiar with machines of that general type?

A. I have been familiar with machines of that general type for close to five years. In fact, it would be five years ago last month or this month. That would be in 1950.

Q. The latter part of 1950, was that?

A. The latter part of 1950, when Mr. Peterson started to design the first machine.

Q. Mr. Johnson, are you the Johnson who is

(Testimony of Orville Martin Johnson.)

the patentee of U. S. Letters Patent No. 2,652,166, which is Defendant's Exhibit S?

A. No, sir, I am not the same Johnson.

Q. Did you know him, however?

A. Yes, I did.

Q. In what connection?

A. Well, I attended the last year at the University in his class, and I also knew him while he worked in the tape-customer engineering department. [308]

Q. I show you the photographs which are Plaintiffs' Exhibits 21-A to 21-G, inclusive, and ask you to describe that machine, first of all, its construction, and in doing so, to illustrate your testimony by labeling by the use of letters by this pin I hand you on the exhibit itself, or on one of these exhibits.

A. Would you like the complete machine designated, all of the parts, or merely the tape applying mechanism?

Q. Well, the general construction of the machine first, the whole machine, and then we will get to the tape applying mechanism later.

A. All right. First of all, the machine consists of a base plate.

Q. Excuse me. Will you letter that? Excuse me one minute. We have some letters on one of these exhibits. Exhibit 21-C has some letters on it, so the next letter will be "F". Will you letter that base you referred to as "F"?

(The witness does as requested.)

Q. You have put the "F" on Exhibit 21-A, have

(Testimony of Orville Martin Johnson.)

you not? You don't need to put it on all these photographs, but just use as few photographs as you can to make your description complete.

A. Fine.

Mr. Lewis E. Lyon: Which one did you put it on?

Mr. Harris: 21-A. [309]

The Witness: 21-A, right. Next, the machine contains two vertical mounting brackets.

Mr. Harris: Will you label those "B-1" and "B-2"?

Mr. Lewis E. Lyon: We already have a "B."

Mr. Harris: Oh, excuse me. That should be G-1 and G-2. I am sorry.

(The witness does as requested.)

The Witness: And the next component would be the electric motor that is used to drive the machine.

Q. (By Mr. Harris): Will you label that "H"?

(The witness does as requested.)

A. The next parts would be the collars for support rollers, which support the two cans, or three cans, if it is a three-can deal.

Q. Will you label one of those collars "I"?

(The witness does as requested.)

A. The next part would be the clamp pad on the left side of the machine.

Q. Excuse me for interrupting you, but is there one or are there two of those rollers such as you have marked "I" on Exhibit 21-A?

A. There are a series of rollers, but they all perform the same function, that is, to support the cans.

(Testimony of Orville Martin Johnson.)

Q. Were you referring just to the collars or to the shafts as well? [310]

A. I was referring mainly to the collars.

Q. And what are those collars mounted on?

A. Each collar is mounted on a shaft.

Q. And is there one shaft, or is there more than one shaft? A. There are two shafts.

Q. In one of the other photographs will you point out the two shafts, if you can find them?

A. Okay.

Q. And identify them as "I-1" and "I-2."

(The witness does as requested.)

Mr. Lewis E. Lyon: Which photograph is that?

The Witness: 21-C.

Q. (By Mr. Harris): Thank you. Now, will you continue with your description? You started to talk about some articles called driving pads. Will you describe those?

A. I had mentioned the clamp pad, which is the pad on the left side of the machine, and is used to clamp the two cans together.

Q. Will you label that as "J" on the exhibit?

(The witness does as requested.)

Mr. Harris: The record should show that appears as "J" on Exhibit 21-A.

Q. Now, will you continue your description?

A. The next part, to identify it, would be the drive [311] pad, which is located on the left-hand side of the machine.

Q. Will you mark that as "K"?

(The witness does as requested.)

(Testimony of Orville Martin Johnson.)

A. Is it all right to use this?

Q. Yes, you may use this Exhibit 21-C, to continue your description.

A. And we will give different numbers; is that it?

Q. Our last number was "K." So the next reference letter would be "L." A. All right.

Mr. Lewis E. Lyon: Did you put "K" on anything?

Mr. Harris: Yes, "K" is on Exhibit 21-A.

The Witness: The next part would be the tape applying roller.

Q. (By Mr. Harris): Will you label that as "L" on Exhibit 21-C?

(The witness does as requested.)

Q. What is that tape applying roller supported on. A. It is supported on a tape applying arm.

Q. In what manner is it supported on that arm?

A. There is a shaft that is mounted directly to the arm, and the roller is mounted on that shaft, or rotates free on that shaft.

Q. Will you identify the tape applying arm you have referred to as "M" on Exhibit 21-C? [312]

(The witness does as requested.)

Q. And how is that tape applying arm supported?

A. It is supported by a shaft, and the shaft is mounted on a vertical mounting member, and that shaft can barely be seen here. Possibly it would be better to do it on this shaft (indicating).

(Testimony of Orville Martin Johnson.)

Mr. Harris: The witness will identify that as "N" on Exhibit 21-E.

Q. Now, will you continue with your explanation of the tape applying arm, and its mechanism?

Mr. Lewis E. Lyon: While he is on that, is that shaft rigid in its support?

The Witness: I will just check to be absolutely sure. Yes, it is.

Mr. Lewis E. Lyon: Pardon me for the interruption.

Q. (By Mr. Harris): Now, will you continue with your description of the mechanism that is carried by the tape applying arm?

A. The second roller, or tape applying roller, is a clutch roller, or a one-way or a one-direction roller.

Mr. Harris: Will you mark that with a capital "O"?

Mr. Lewis E. Lyon: It is already marked.

Mr. Harris: Oh, excuse me. That has already been identified on the exhibit as "C," is that correct?

The Witness: Right. [313]

Q. (By Mr. Harris): Very well. How is that mounted with respect to the tape applying arm?

A. That roller is allowed to freely rotate in one direction on a shaft that is rigidly attached to the tape applying arm.

Q. Why do you say in one direction?

A. Because, due to a rigid device, it is allowed to move in only—looking at the machine from this side—in the counterclockwise direction. That al-

(Testimony of Orville Martin Johnson.)

lows tape to be applied to the cans but prevents the tape from backing out between the two rollers.

Q. Is that the construction that is illustrated by the letters "B" and "D" already on Exhibit 21-C?

A. Yes, that is correct. Shall I go ahead?

Q. Yes, if you will, please.

A. There is also a second arm that is mounted alongside of the tape applying arm, which is known as the buffing arm.

Q. Yes. Will you mark the buffing arm, to identify it, with a capital "O"?

(The witness does as requested.)

Q. And how is it supported?

A. It is allowed to rotate or move freely on a shaft that is rigidly affixed to the same vertical member that holds the tape applying arm. [314]

Q. Are the tape applying arm and the buffing arm mounted on the same pivot?

A. Yes, they are.

Q. And what is carried by that buffing arm?

A. On the end of the buffing arm a buffing roller is mounted.

Q. Will you please mark that as "P" on the print, Exhibit 21-C?

(The witness does as requested.)

A. Also, on that arm a knife is mounted for cutting the tape.

Q. Will you mark that "Q," if you please?

(The witness does as requested.)

Q. Does that knife have a blade, a sharp edge?

A. Yes, a very sharp edge.

(Testimony of Orville Martin Johnson.)

Q. Will you mark the sharp edge as "R"? Let's mark it "R."

(The witness does as requested.)

A. Shall I go ahead, then?

Q. Yes.

A. The next component would be the pre-stripping roller, which is already marked by "A."

Q. On Exhibit 21-C? A. Yes.

Q. How is that roller supported? [315]

A. It is supported by a bracket or by a shaft and allowed to rotate on the shaft, and the shaft is rigidly affixed to the mounted bracket.

Q. Is the mounted bracket itself identified on this print? A. No.

Q. Then let's mark it "S."

(The witness does as requested.)

A. The machine also contains a drum on which the tape core is mounted.

Q. Will you mark that drum as "T" on the exhibit?

(The witness does as requested.)

Q. What is the function of that drum "T"?

A. It holds the tape roll.

Q. Is the tape roll free to rotate on the drum or the shaft of the drum?

A. The drum is allowed to rotate freely on the shaft.

Q. On the shaft that supports it? A. Yes.

Q. What is that shaft held on?

A. The shaft is rigidly mounted to the tape applying arm. I can go into more detail.

(Testimony of Orville Martin Johnson.)

Q. Well, you might point out the ejecting mechanism on this appliance. A. Yes, There is a——

Mr. Lewis E. Lyon: Before you do that, may I ask one question?

Mr. Harris: Yes.

Mr. Lewis E. Lyon: Are E-1 and E-2 the same as you have marked "L" on Exhibit 21-C?

The Witness: Yes.

Q. (By Mr. Harris): And to clear that up, E-1 and E-2 illustrate a pair of rollers on the same shaft, do they? A. Yes.

Q. Now, is there an ejectment mechanism on this?

A. Yes, there is an ejector in the machine, and it consists of a pair of ejector arms, and rollers attached to the arms.

Q. Would you mark the arms as "U-1" and "U-2"?

(The witness does as requested.)

A. It is very hard to see those arms on these.

Mr. Harris: Perhaps if you could mark one of the arms on one of the exhibits it would be sufficient.

Mr. Lewis E. Lyon: It is on 21-C.

The Witness: Here I see them very well, on 21-A. Shall I mark them?

Q. (By Mr. Harris): You might mark them "U-1" and "U-2."

(The witness does as requested.)

Q. Referring you particularly to Exhibit 21-C, I notice what appears to be a pin and a small dog or arm [317] connected to the buffing roller arm, or is that the taping roller arm?

(Testimony of Orville Martin Johnson.)

A. No, the pin is attached rigidly to the buffing arm.

Q. Will you mark that pin as "V"?

(The witness does as requested.)

Mr. Harris: I produce a group of five schematic drawings which I ask to be marked as Defendant's Exhibits X-1, X-2, X-3, X-4 and X-5.

The Clerk: Defendant's Exhibits X, X-1, X-2, X-3, and X-4, marked for identification.

(The documents referred to were marked Defendant's Exhibits X, X-1, X-2, X-3 and X-4, for identification.)

Q. (By Mr. Harris): Mr. Johnson, I show you Exhibits X, X-1, X-2, X-3 and X-4, for identification. Were those drawings made under your direction and supervision? A. Yes, they were.

Q. What do they illustrate?

A. They illustrate the tape applying mechanism that is used on the Dellenbarger can banding machine.

Q. Which one?

A. The one that was in the courtroom, the one that is used by Oriental Foods.

Q. The one shown in the photographs, Plaintiffs' Exhibit 21? A. Yes, sir. [318]

Q. You have labeled some of these photographs, Plaintiffs' Exhibits 21-A, -B, -C and so forth. Will you kindly on Figure 1 of Defendant's Exhibit X put the corresponding identifications, insofar as you can? A. Yes, sir. [319] * * * * *

Q. (By Mr. Harris): Does that work?

(Testimony of Orville Martin Johnson.)

A. Yes, this works very nicely.

Q. I don't think you made the "I" quite plain enough, Mr. Johnson.

Very well. Will you make that lead line a little heavier, so that it is plain?

(The witness does as requested.)

Q. I was pointing to this arm here, and not the roller itself.

A. That is the one. (Indicating.) [320]

Q. Thank you. Now, will you mark on Exhibit 21-D, which I have here, the letter "Y" to identify the cans in the machine? And the same on Exhibit X?

(The witness does as requested.)

Q. Now, Mr. Johnson, using Defendant's Exhibits X, X-1, X-2, X-3 and X-4, will you kindly explain the operation of the machine shown in the photographs, Plaintiffs' Exhibits 21 and following?

A. Should I explain that right from here?

Q. Yes, If you will, by reference to these schematic sketches that you have had made.

A. The tape applying roller——

Q. First of all, what does Figure 1, which is Defendant's Exhibit X, show?

A. Figure 1 shows the tape applying arm and the buffing arm in the rest position before the tapping cycle begins.

Q. What is the heavy black line in that figure on the exhibit?

A. The heavy black line indicates the route of the tape from the tape roller, around the pre-strip-

(Testimony of Orville Martin Johnson.)

ping roller, between the clutch roller and the applying roller.

Q. And in that position what is the condition of the free end of the tape, which is shown as being just below the applying roller?

A. The tape is free, that is, it is held at one end [321] by the applying roller and the clutch roller. On the other end, it is free.

Q. That is the part marked "end of tape" on this sketch?

A. The part of the tape marked "end of tape" is free, yes.

Q. Now, will you go on with your explanation of what happens, first, in the operation of this machine? What is the first thing that happens?

A. The first thing that happens is that the operator turns on the switch, which starts the electric motor running. She then places two cans in end-to-end relationship on the support collars marked "I" in this sketch.

She then releases the clutch by pulling the clutch trip lever, and that isn't marked on the photograph, and when the clutch is released or tripped, the tape applying arm moves downward in the direction of the two cans. The tape applying roller brings the free end of the tape into contact with the two cans.

Q. Where is that shown in these sketches?

A. That is shown in sketch No. 2.

Q. Figure 2, which is Defendant's Exhibit X-1?

A. X-1, correct. At this point the tape between the tape roller and the clutch roller is in a relaxed

(Testimony of Orville Martin Johnson.)

condition, that is, there is a slack and there is a free loop of tape. [322]

Q. Where, with respect to the pre-stripping roller?

A. The free loop extends down below the pre-stripping roller.

Q. And in that position shown in Exhibit X-1, what is the position of the buffing roller, of the buffing arm?

A. The buffing arm has also moved down into contact, or, that is, the roller on the end of the buffing arm has moved into contact with the two cans. Simultaneous with the contact of the rollers with the cans, the cans begin to rotate.

Q. In what direction, as viewed in Figure 2, which is Defendant's Exhibit X-1?

A. As viewed in Figure 2, the cans rotate in a counterclockwise direction.

Q. Approximately what is the speed of rotation of the cans?

A. The speed of rotation on the Oriental machine is approximately 60 revolutions per minute.

Looking at Figure 3, which is Exhibit No. X-2, the cans have rotated a few degrees, or, that is, an increment of full rotation, and it shows that the free loop of tape is being taken up, but in this figure the free loop has not been used up completely.

Then referring to——

Q. Excuse me just a minute. I note that apparently in [323] that Figure 3 the end of the tape

(Testimony of Orville Martin Johnson.)

is beneath—has passed beneath the buffing roller. What is the purpose of that?

A. The purpose of the buffing roller is to firmly wipe the tape into contact with the two cans.

Q. And does the applying roller, as shown in Figure 3, have any function during that operation?

A. Yes, the applying roller continues to place the tape into contact with the cans. It serves the function at that time, yes. The buffing roller merely serves to insure a good job.

Q. Now, up to the point in the operation illustrated by Figure 3, which is Exhibit X-2, has there been any tension on the end of the tape that is shown applied to the cans in that figure?

A. No, sir, there has been no tension up to that point.

Q. Now, will you proceed with your explanation of the operation?

A. Referring to Figure 4, the free loop of tape that has been provided by the pre-stripping roller has been taken up, and the rotation of the cans actually strips tape from the tape roll.

Q. The tape passing where on to the cans? What is the route of the tape?

A. The tape goes from the tape roll down to the pre-stripping roller, around the pre-stripping roller, and up to [324] the clutch roller. It goes between the clutch roller and the tape applying roller, and from there on to the two cans.

Q. Now, continuing with your explanation, what does Figure 5, which is Exhibit X-4, show?

(Testimony of Orville Martin Johnson.)

A. Moving on to Figure 5, the two cans have made one complete revolution, plus a fraction of a revolution that is sufficient to provide a tape overlap.

Q. Then what occurs?

A. At this point the tape applying arm is actuated through a cam and linkage in such a manner that the tape applying roller moved away from the two cans.

Q. To the position shown in Figure 5?

A. To the position shown in Figure 5, yes.

Q. And what effect does that have?

A. The buffing arm is individually spring loaded in the direction of the cans, so that as the applying roller moves upward it draws the tape across the knife, to sever the tape.

Further movement of the tape applying arm causes the applying arm to engage a pin on the buffing arm, to pull the buffing arm upward, also, so that it makes room for the cans to be ejected from the machine.

Q. And then do the cans continue to rotate from this position shown in Figure 5?

A. Yes, they actually continue to rotate for a few [325] degrees, and it rotates long enough so that the buffing roller can wipe the last tab, end tab of tape down to the cans.

Q. And then what happens?

A. Then further movement of the applying arm causes the arm to contact the pin, and moves both

(Testimony of Orville Martin Johnson.)

arms free of the cans, such that the cans can be ejected.

Q. What is the function of this pre-stripping roller that you have referred to in this mechanism?

A. The function of the roller, of the pre-stripping roller, is to provide slack tape, that is, a free loop of tape.

Q. At what point in the operation?

A. The loop is made when the tape applying arm moves upward to cut the tape. At that point the tape web engages the stationary pre-stripping roller, and actually the pre-stripping roller pulls tape from the roll of tape.

Q. And why is it desirable to have such a free loop of tape in this mechanism?

A. The free loop of tape is necessary so that we can insure a positive application of tape to the cans initially, so that the tape will not tend to pull off the surfaces of the cans as the cans begin to rotate. It means that for the first increment of rotation the tape is not under any tension, it is merely free or loose, and can be easily wiped to the can, and it increases the amount of tack to make a more positive [326] application.

Q. Mr. Johnson, I show you Defendant's Exhibit S, for identification, which is the Johnson Patent No. 2,652,166. Are you familiar with that patent and its contents? A. Yes, sir.

Q. Will you please state how the mechanism shown in that patent compares with the mechanism of the defendant's Dellenbarger machine, Exhibit

(Testimony of Orville Martin Johnson.)

21, which is here shown by the photographs, Plaintiffs' Exhibits 21-A and following?

A. The mechanical principle by which the Dellenbarger can banding machine operates is equivalent to the tape applying mechanism described in the Johnson patent.

Q. Now, how does the operation of the mechanism shown in the Johnson patent compare with the operation which you have described in relation to Defendant's Exhibit X, X-1, X-2, X-3 and X-4, as pertains to the defendant's Dellenbarger machine?

A. Could you read that question over again? It was a little long.

(The question was read.)

A. The mechanical principle, as described by the Johnson patent, is also equivalent to the principle of operation that we have described by going through the sketches before me. [327]

Q. And as to the method of operation, would a machine built—would a tape applying mechanism, as shown in the Johnson patent, operate the same or differently than the defendant's Dellenbarger machine?

Mr. Lewis E. Lyon: Your Honor, I will object to that on the ground the witness has not been qualified to answer the question, as to whether he ever saw a machine like the Dellenbarger machine.

The Court: Overruled. That goes to the weight. Go ahead. You may answer.

(Testimony of Orville Martin Johnson.)

The Witness: Would you read the question again, please?

(The question was read.)

The Witness: It would operate the same as the mechanism on the Dellenbarger machine. [328]

* * * * *

Q. (By Mr. Harris): Mr. Johnson, you heard the testimony by Mr. Peterson as to a machine which was built, and taken up or sent up to the Chun King plant in Duluth, Minnesota. You heard that testimony, did you not?

A. Yes, sir.

Q. Did you personally have any acquaintance or familiarity with that machine, to which he referred?

A. Well, I do recall that Mr. Peterson had that development as one of his projects, because I was interested in projects that everyone had in the department, and I do recall him working on that machine.

Q. Approximately when was that?

A. That was in the Fall of 1950.

Q. What was the first machine that you ever saw for banding cans together end-to-end by sticky resilient tape?

A. The first machine I saw was the one that Mr. Peterson completed in our department.

Q. Did your department, to your knowledge, make any actual drawings of that first prototype machine?

(Testimony of Orville Martin Johnson.)

A. No, they didn't make any drawings of the first prototype machine.

Q. Do you know of any later machine of generally similar character made in your department at Minnesota Mining [329] & Manufacturing Company at a later date?

A. Yes, at a later date another machine was constructed.

Q. Approximately when was that, Mr. Johnson?

A. I can't answer that question, because I don't have the date.

Q. Do you know what happened to that second machine? A. No, sir, I don't.

Q. Do you know what happened to the first machine that was sent up to Chun King?

A. I know it was at Chun King Sales for a time, and I am also aware that it took part in a packaging show in 1952, and from there I am aware that it went out to the Dellenbarger Machine Company in New York, to be used as a guide from which Dellenbarger could put out a standard production can banding machine.

Mr. Harris: That is all, your Honor. Counsel may cross examine.

The Court: Cross examine.

Mr. Harris: Oh, excuse me, one further question. I do have one further identification to make.

The Court: All right. All the documents, sketches and photographs to which this witness has testified are in the record?

Mr. Harris: Yes, your Honor, they are.

(Testimony of Orville Martin Johnson.)

Q. Mr. Johnson, I show you a drawing which is Plaintiffs' [330] Exhibit 31, for identification, and ask you if you recognize that drawing?

A. Yes, I do.

Q. How does the construction shown in that drawing compare with the actual defendants' machine, which was marked for identification as Plaintiffs' Exhibit 21, and which was here in court?

A. Well, I am aware that the Dellenbarger Machine Company assembled the machine that was in court from this drawing.

Q. And will you point out, perhaps using the photographs, Plaintiffs' Exhibits 21-A, -B, -C, and so forth, to point out what differences, if any, there are between the actual defendant's machine and the machine shown by this drawing, Plaintiffs' Exhibit 31.

A. Well, there are a few minor differences that can be pointed out. They don't affect the over-all operation of the machine, however.

One difference is the fact that the drawing does not include safety shields on both ends of the machine, whereas the actual machine did contain safety shields.

Secondly, the shaft on which the tape applying arm and the buffing arm rotate extends out from the mounting bracket on the drawing, whereas on the actual machine the shaft does not extend out from the bracket. [331]

Q. Are there any other differences that you noted?

(Testimony of Orville Martin Johnson.)

A. Yes. The drawing of the machine shows that the clutch roller, over which the tape passes, is a roller that has lends and grooves in it, that is, the lends and grooves go around the roller, whereas the actual machine has a knurled clutch roller, in which the knurls or lends and grooves are at right angles to the direction in which the tape moves.

The machine drawing has a one-way clutch also, but the clutch is an internal spring-type clutch, whereas the actual machine uses a ratchet spring to keep the roller from rotating in a clockwise direction.

There is one other difference. The drawing shows a certain type of handle on the clutch release, whereas the machine actually had a different shaped handle.

Q. Are any of those differences significant in the operation of the machine? A. No, sir.

Mr. Harris: At this time I wish to offer into evidence these five schematic drawings that the witness has identified as Defendant's Exhibits X-, X-1, X-2, X-3, and X-4.

The Court: All right.

(The documents heretofore marked Defendant's Exhibits X-, X-1, X-2, X-3 and X-4, were received in evidence.)

[See Book of Exhibits.]

Mr. Harris: I also offer into evidence at this time [332] this drawing, which is Plaintiffs' Exhibit 31, for identification, as Defendant's Exhibit next in order.

(Testimony of Orville Martin Johnson.)

The Court: It may be received.

(The drawing formerly a part of Plaintiffs' Exhibit 31 was marked Defendant's Exhibit Y and received in evidence.)

Mr. Harris: That is all, your Honor.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Lewis E. Lyon): You are presently in the employ of the Minnesota Mining & Manufacturing Company, are you?

A. Yes, sir.

Q. The Minnesota Mining & Manufacturing Company ordered you out here, did they?

A. The boss of my department asked me to come out, yes.

Q. And ordered you to report to Mr. Harris; is that correct? A. Yes, sir.

Q. They told you that he was the attorney representing the company? A. No, sir.

Q. What did he tell you he was the attorney for? [333]

A. I understood then, and still do, that Mr. Harris was representing Oriental Foods Company in Los Angeles.

Q. You know, do you not, that your company is paying Mr. Harris in part?

A. No, sir, I did not know that.

Q. Had you talked to Mr. Harris before you were ordered out here? A. No, sir.

Q. Were you told, when you were sent out here

(Testimony of Orville Martin Johnson.)

to meet Mr. Harris, that he would tell you what to do? A. Yes, sir.

Q. For the company?

A. If you mean Oriental Foods, but not for Minnesota Mining.

Q. I mean, for Minnesota Mining & Manufacturing Company.

A. No, sir, not for Minnesota.

Q. Just exactly what was said to you?

A. I was told that a lawsuit was taking place in Los Angeles, Chun King Sales Company of Duluth versus Oriental Foods of Los Angeles, and that I might be able to provide some information that would have a bearing on that trial.

Q. Did they tell you what information?

A. Yes. They said that it would be necessary to describe the operation of a Dellenbarger can banding machine, and I have seen several of them in operation, and they felt that [334] I would be the logical person, then, to explain it.

Q. Why were they interested in Dellenbarger machines—your company?

The Court: If he was informed. This, I gather, goes merely to show possible bias.

Mr. Lewis E. Lyon: Yes, your Honor.

The Court: And the interest of the witness.

Mr. Lewis E. Lyon: Also, to show the part taken by Minnesota Mining & Manufacturing Company in the defense of this action.

The Court: It matters only for two purposes, and that is merely to show the interest of their

(Testimony of Orville Martin Johnson.)

witnesses, and, of course, if it should develop that they are the real beneficiary or party in interest, then the court has power. But I haven't seen any such so far. [335]

* * * * *

The Clerk: For the record, Mr. Harris, Exhibit 31 was a group of drawings. Do you, therefore, want to introduce the particular drawing of the can banding machine as Exhibit 31-A?

Mr. Harris: No, just the one drawing I examined the witness on, which is drawing 30006.

The Clerk: Exhibit 31 was originally a group of drawings. Do you want this as 31-A?

Mr. Harris: No, I want to make this drawing defendant's exhibit next in order, whatever the exhibit is.

The Clerk: Then, for the reporter, this drawing that is taken out of Plaintiffs' Exhibit 31 is now Defendant's Exhibit Y.

The Court: Let's go on, gentlemen.

Mr. Lewis E. Lyon: Let me see that, please.

(The document was handed to counsel.)

Q. (By Mr. Lewis E. Lyon): You testified that you knew that the machine that was here in court, Exhibit 21, for identification, was assembled from this drawing, Exhibit Y; is that correct?

A. Yes, sir. [337]

Q. How did you know it? Were you there?

A. I wrote to the Dellenbarger Machine Company, and asked them for a set of the drawings that they used to construct the machine for Oriental

(Testimony of Orville Martin Johnson.)

Foods, and they sent the drawings to me a week later, with a letter indicating that the machine was built from those drawings.

Q. Then the only information that you have is what someone told you by letter; is that correct?

A. No, that is not correct. I can also observe the machine and notice that the machine was constructed from those drawings.

Q. You were not present and did not see anybody assemble the machine that was here in court, were you? A. Pardon me?

Q. You were not present in the Dellenbarger Machine Works and saw the machine assembled that was here in court? A. No, sir.

Q. You do not know whether the Dellenbarger man who assembled the machine even had the drawing, Exhibit 31, in front of him, do you?

A. Yes, I would—I believe he did, or I don't think he could have constructed the machine, because he would need to have the drawing in order to construct the machine.

Q. The only thing is that you have been told this was a drawing that they had; isn't that correct? You weren't there? [338]

A. I wasn't there, but I was told by letter, yes.

Mr. Lewis E. Lyon: I move to strike the statement of the witness with reference to the assembly of the machine as founded entirely upon hearsay.

The Court: The motion will be denied.

Q. (By Mr. Lewis E. Lyon): Now, you stated, or you pointed out a number of differences in the

(Testimony of Orville Martin Johnson.)

machine and that which is shown by this drawing, Exhibit Y—pardon me. Where I said 31 before, it should have been “Y.” Have you pointed out all the differences?

A. I pointed out all the differences that I observed.

Q. Well, are those all the differences, I am asking you.

A. I would have to make a very thorough detailed examination of the drawing alongside of the machine before I could answer that question.

Q. And you have never done that?

A. I made an examination that took approximately a half an hour.

Q. From that examination you cannot now say whether or not you have pointed out all the differences between this drawing, Exhibit Y, and the machine, Exhibit 21, for identification; is that correct?

A. I believe I have pointed out the major differences. [339]

Q. All right. You are not willing to say that you have pointed out all the differences? Your examination has not been sufficient; is that correct?

A. I wouldn't say it wasn't sufficient, no.

Q. All right. Point out any other differences, then?

A. I would have to have the machine in front of me in order to point out the differences other than those that I have already mentioned.

Q. And you do not have that machine here?

(Testimony of Orville Martin Johnson.)

A. No, sir.

Q. Do you have any knowledge as to when this drawing, Exhibit Y, was drawn?

A. No, sir.

Q. Do you have any idea as to what the insignia in the right-hand corner of this drawing means, where it says, "11-54"?

A. I imagine that means the date.

Q. Which would be November 1954, would it not?

A. Yes.

Q. As a matter of fact, you have heard the testimony that the machine, Exhibit 21, was delivered before that date, have you not?

A. Yes, that is correct.

Q. You testified with respect to the operation of this machine, Exhibit 21, for identification, as shown by the [340] photographs, Exhibits 21-A to 21-G, inclusive, have you not?

A. Yes, sir.

Q. You heard the testimony of the prior witness, Mr. Peterson, did you not?

A. Yes, sir.

Q. Do you agree with what he said?

A. Essentially I would, yes.

Q. You agree, then, that a function of this roller, which you call a pre-stripping roller, as you have illustrated the same in the drawings, Exhibits X-1 through X-4, inclusive, was to apply tension to the tape; is that correct?

A. Would you please state the question again?

Mr. Lewis E. Lyon: Will you read the question, please?

(The question was read.)

(Testimony of Orville Martin Johnson.)

The Witness: No, that is not correct. It performs the opposite function.

Q. (By Mr. Lewis E. Lyon): As it is illustrated in Figure 5 and in Figure 4, it is acting to cause the tape to be pulled through a more circuitous route, is it not? A. Yes, sir.

Q. And you agree with Mr. Peterson's statement that under those conditions it requires more pull to pull a structure through a path, do you not?

A. We would naturally have to agree that it would take more pull, yes. [341]

Q. All right. Then in Figures 4 and 5, where it is pulling through a circuitous route, you have to admit, don't you, that it is causing more tension to be applied to the tape at that portion of the operation?

A. A very minute amount of additional tension.

Q. Did you ever measure it? A. No, sir.

Q. Did you ever physically take hold of the tape and try to pull it through there? A. Yes, sir.

Q. Did you ever unwind the tape from off of what you call a pre-stripping roller and try it?

A. Yes, sir.

Q. And it took more tension to pull it, did it not?

A. It is not measurable, so I couldn't tell.

Q. Did you put anything on there to measure it?

A. No, sir.

Q. Then how do you know it is not measurable?

A. Because I know the force required to rotate a small roller of that type is very small.

(Testimony of Orville Martin Johnson.)

Q. Do you know the magnitude of the tension which is required to stretch the Minnesota Mining & Manufacturing Company tape to cause that tape to stretch sufficiently to adhere to the side walls of the can and pass completely around the beads, as it does in this Exhibit 10 illustration? [342]

A. I do know how much force is required to stretch one-half inch wide No. 600 cellophane tape.

Q. All right. How much is it?

A. It is approximately seven and one-half pounds.

Q. You know, do you not, that the Dellenbarger machine, Exhibit 21, if it is operating correctly, applies that requisite tension in order to cause that stretch of the tape, to cause it to adhere to the tape and the side walls, do you not?

A. No, I do not know that.

Q. You do not think it will do that; is that right?

A. I doubt if the tape is stretched to the extent of seven and one-half pounds, or put under tension to the extent of seven and one-half pounds in the Dellenbarger machine.

Q. In the structure as illustrated by Exhibit 24, is that tape stretched so as to cause the tape to adhere completely to the side walls of the can and around the beads?

A. It is very difficult for me to say. I am not sure.

Q. It was this type of structure like Exhibit

(Testimony of Orville Martin Johnson.)

24 that the Dellenbarger machine, Exhibit 21, was set up to operate on, wasn't it?

A. Yes, sir.

Q. I mean, it was set up that way when it was in court here? [343]

A. No, when it was in court, it was set up to tape two cans together, not three cans.

Q. Well, had you seen it in operation in the defendant's plant, set up to operate on three cans, like Exhibit 24?

A. No, sir.

Q. Did you ever see it in operation?

A. I have seen the machine in operation many times, but not in the Oriental Company's plant.

Q. You never saw it in operation in their plant?

A. No, sir.

Q. You have testified that the drawing, Exhibit on Exhibit Y that spring operated clutch?

Y, has a spring operated clutch. Will you just mark

A. It is very difficult to see, but we can see it on this drawing, and that is this part (indicating), that the lends and grooves are high spots and valleys.

Q. All right. Just mark it there with the letter "Z." I don't think we have used that one yet.

(The witness does as requested.)

Q. The function of that spring you say is the equivalent of the ratchet mechanism which was employed in Exhibit 21-F; is that correct?

A. Yes, sir.

Q. And the function of that spring is to put a

(Testimony of Orville Martin Johnson.)

[344] resistance to the free rotation of what you call the clutch roller, as it is exhibited on Figure 21, is it not?

A. No, sir, that is not right.

Q. It does not apply resistance to its rotation?

A. It was designed to prevent the tape from backing up.

Q. Does it not apply a resistance to the free rotation of the roller?

A. Just a very minute amount, enough to rotate the roller, and that is all.

Q. And that is so the roller won't rotate forward or backward, and the same pressure is applied in each direction?

A. No, sir.

Q. Why not?

A. It is the intent of the design that the roller turn as free as possible in the direction that will allow tape to be applied to the can, whereas it will not allow rotation in the opposite direction.

Q. Did you ever see a structure made like Exhibit Y in that respect?

A. Exhibit Y?

Q. This drawing in front of you?

A. Yes, sir.

Q. You have seen a Dellenbarger machine made that way? [345]

A. No, I haven't watched them build the machine, but I have examined the Dellenbarger machine.

Q. With a spring-urge clutch in there?

A. Yes, sir.

(Testimony of Orville Martin Johnson.)

Q. And that spring-urge clutch put a resistance to the free passage of the tape through the machine, didn't it?

A. It is a free moving, or a free rotating roller in the direction in which the tape is applied.

Q. Just answer the question, please.

A. So that the amount of resistance is very, very slight.

Q. Do you know whether a machine like Exhibit Y ever functioned satisfactorily?

A. Yes, sir.

Q. Would you say that the machine which was exhibited here in court operated satisfactorily?

A. After we made some adjustments on it, yes.

Q. Would you say that this, which is an illustration of the can which was taped in that machine, illustrates a satisfactory taping? And the exhibit is Exhibit 23.

A. I can't answer that question, because I don't know what Oriental Foods' requirements are, so I don't know if that is satisfactory or not.

The Court: Would it be considered a workman-like job, that would pass the test which you apply in the art? [346]

Q. (By Mr. Lewis E. Lyon): Would that be satisfactory to you?

A. I would like to mention one thing, first, that the machine could not be expected to do a good job since the cans are dented.

Q. Just answer the question, please. Would that be satisfactory to you?

(Testimony of Orville Martin Johnson.)

The Court: It is not what you expect. The question is: Is this a satisfactory job? You used the word "satisfactory."

The Witness: I believe that is a satisfactory job, in my estimation.

Q. (By Mr. Lewis E. Lyon): To your mind, it would be satisfactory? A. Right.

Q. You heard the testimony of the witness, the plant manager, say that it was unsatisfactory, didn't you? A. Yes, sir.

Q. But to you it is satisfactory?

The Court: That is argumentative. We don't care what he heard somebody else say. You have got his answer, and that is what you want.

Q. (By Mr. Lewis E. Lyon): Now what possible difference can the dents in the cans make when the cans are wholly supported in the machine by the flanges at the ends? The end flanges aren't dented, are they? [347] A. No, sir.

Q. What possible difference can it make that the side walls are dented?

A. Well, it is conceivable that the dents could cause the cans to bounce a little bit in the machine.

Q. How? Is there anything in contact with those side walls? A. Yes, sir.

Q. What?

A. The collars on which the cans or side walls are supported.

Q. What collars?

A. The collars that are—the collars that are marked "I" on Exhibit 21-A.

(Testimony of Orville Martin Johnson.)

Q. And as you look at those exhibits, 21-A to -G, you will find the cans are wholly supported by the collars on the end flanges, and not on the side walls, will you not?

A. They are supported there, but if there are dents in the cans, it is conceivable that there could be some slippage.

Q. Slippage from what?

A. Slippage caused by the support collars marked, I believe it is "I"—

Q. Will you look at exhibits——

A. ——contacting the dents in the can. [348]

Q. Will you look at Exhibits 21-A to -G, and tell me how any one of those rollers "I" could possibly contact any of those dents?

A. The rollers support the cans.

Q. On the flanges, do they not?

A. The two cans rest on the rollers.

Q. On the end flanges,—on their end flanges, and not on the side walls of the can.

A. That I am not certain. I can't answer the question.

Q. You don't know what supports the cans in the machine?

A. No, sir. It is possible that they could support the side walls.

Q. Do you know why the Dellenbarger Machine Company, in making the machine, Exhibit 21-F, that was here, serrated the rollers lengthwise, and by that I mean the roller which is marked "C" on

(Testimony of Orville Martin Johnson.)

Exhibit 21-C, instead of making it plain, as shown in the drawings, or grooved circumferentially around the roller?

A. The Dellenbarger Machine Company did not make that change.

Q. Oh, they did not. Do you know who did?

A. Yes, sir.

Q. Who? A. The Minnesota Mining. [349]

Q. And why?

A. The spring clutch arrangement has a tendency to wear out faster than the ratchet device.

Q. I am not talking about the ratchet or the spring clutch. I am talking about the longitudinal serrations.

A. Oh, I am sorry.

Q. Did Dellenbarger—

The Court: Just a moment. Give the witness a chance to answer the question, now that you have corrected your question. Go ahead.

The Witness: The machine came back to Minnesota Mining for repair and adjustment, and we wanted to revise the clutch arrangement so that it would stand up longer under production use and still incorporate the same principle or idea behind this roller. We wanted to do it as fast as we could, and as inexpensively as we could, and we felt that by knurling the roller rather than making lends and grooves that go around the circumference, we could do the job faster and at less expense.

Q. (By Mr. Lewis E. Lyon): And, also, that that roller would get a better grip on the tape that way, wouldn't it?

(Testimony of Orville Martin Johnson.)

A. No, sir. It definitely does not get a better grip on the tape.

Q. Why not?

A. Because a knurl has high spots and low spots, and [350] by the very virtue of the knurl the adhesive comes in contact with the reduced area of metal.

Q. And the knurl also has a sharp edge at the edge of the knurl, hasn't it, at each knurl?

A. Not a sharp edge. It has a flat.

Q. And that flat will tend to dig into the tape, will it not? A. No, sir.

Q. Isn't that the purpose that we knurl an object in machine tool design.

A. It depends on what the knurl surface is going to be used for.

Q. Isn't it so that we get a better gripping surface?

A. Not when we speak of tape. No, sir, it has exactly the opposite intention.

Q. Now, when was this change made in this machine, when it was sent back to Minnesota Mining? A. It was in the Fall of 1954.

Q. Why was Minnesota Mining interested in revising or making over so it would work a machine of the Dellenbarger Machine Company?

A. The people of Oriental Foods mentioned to our tape salesman that the machine was giving them trouble, and they would like to have it repaired, and inasmuch as Dellenbarger is located many thousands of miles away, a good [351] deal

(Testimony of Orville Martin Johnson.)

further than St. Paul is, we suggested that we would take it back to our company and repair it for them, rather than having it sent to Dellenbarger.

Q. Did you have any permission from Dellenbarger to revise their machine?

A. Yes, we did.

Q. Is Dellenbarger a subsidiary of Minnesota Mining & Manufacturing Company?

A. No, sir.

Q. What is the relation?

The Court: Let's not go into that, gentlemen. It is not material. He said that they had permission, and that is enough. Let's go to something else.

Q. (By Mr. Lewis E. Lyon): You have testified something about a machine that was exhibited at a packaging show in 1952. Were you there?

A. No, sir.

Q. Did you see the machine at the show?

A. No, sir.

Q. Did you have anything to do with sending the machine to the show? A. No, sir.

Q. Did you see the machine that was at that show at any time?

A. That is the machine that—— [352]

Q. Just pardon me. I would like to have an answer to the question. A. Yes, sir.

Q. Where?

A. In the tape-customer engineering department of Minnesota Mining.

Q. How do you know that the machine that

(Testimony of Orville Martin Johnson.)

you saw at the tape-customer engineering department of Minnesota Mining was the Dellenbarger machine that was exhibited at the show in 1952?

A. It wasn't a Dellenbarger machine. It was a machine designed and built by Mr. Peterson for Minnesota Mining.

Q. How do you know that that was the machine?

A. I was told it was the machine by my department head.

Q. And that is the only information you have?

A. Yes, sir.

The Court: Anything further, Mr. Lyon?

Mr. Lewis E. Lyon: Just a minute, your Honor. I am trying to find out.

Q. You have testified that you knew Mr. A. E. Johnson, the patentee of the patent, Exhibit S, for identification; is that correct? A. Yes, sir.

Q. Is he still associated with Minnesota Mining & Manufacturing Company? [353] A. Yes, sir.

Q. In Minneapolis? A. In St. Paul.

Q. In St. Paul. He is still available to testify for himself if he were called? A. Yes, sir.

Q. The two rollers or two shafts carrying the rollers "I," which you have marked on Exhibit 21, whatever it was here in front of you—I will get them——

The Court: Don't worry about those. The clerk will straighten them out. Let's finish the cross examination. Mr. Cunliffe will straighten out the records after we adjourn.

(Testimony of Orville Martin Johnson.)

Mr. Lewis E. Lyon: Yes, your Honor.

Q. —on Exhibit 21-A, provide the supports for the cans as they are being rotated, do they not?

A. Yes.

Q. And there are on Exhibit 21-A eight of such rollers "I," are there not? A. Yes, sir.

Q. And those eight rollers are all the same size?

A. Yes, sir.

Q. And they provide the equivalent for supporting in rotatable relationship to the trough or angle iron exhibited in Exhibit B, do they not? [354]

A. They support the cans as the trough does, yes, sir; the equivalent.

Mr. Lewis E. Lyon: These photographs, Exhibits A, B, C and D, did those come from the files of the Minnesota Mining & Manufacturing Company, to your knowledge, and C and D are over here?

Mr. Harris: We will stipulate they did.

Mr. Lewis E. Lyon: I want to know whether this witness brought them or not.

Mr. Harris: He did.

Mr. Lewis E. Lyon: You stipulate that he brought them with him?

Mr. Harris: Yes.

Mr. Lewis E. Lyon: All right.

Q. Now, I call your attention to the file numbers on these, A11705-1, ending with A11705-7. Does that indicate a series of those photographs?

A. I believe it does, yes.

(Testimony of Orville Martin Johnson.)

Q. And in that series there are the drawings A11705-6, and A11705-2, and -3, are there not?

A. I believe there would be those photos also.

Q. Why didn't you bring those?

A. I have never seen them.

Q. You believe that there are such photographs, however? [355] A. Yes, sir.

Mr. Lewis E. Lyon: That is all. * * * * * [356]

Monday, November 28, 1955, 10:30 A.M.

Mr. Harris: If the court please, first I will offer into evidence Defendant's Exhibits A and B, for identification, as Defendant's Exhibits of the same letters.

The Court: They may be received.

Mr. Harris: Next, I offer into evidence the photographs, Defendant's Exhibits C and D, as Defendant's Exhibits of the same letters.

The Court: All right. * * * * * [361]

(The documents heretofore marked Defendant's Exhibits A, B, C, and D, were received in evidence.)

[See Book of Exhibits.]

Mr. Harris: If the court please, may I offer into evidence the file wrapper of the patent in suit, marked Defendant's Exhibit E, for identification, as defendant's exhibit bearing the same letter.

The Court: It may be received.

(The document heretofore marked Defendant's Exhibit E was received in evidence.)

[See Book of Exhibits.]

Mr. Harris: Next, if the court please, I offer into evidence the prior art patents pleaded, which are Defendant's Exhibits F through S, inclusive, as defendant's exhibits bearing the same letters. [363]

* * * * *

(The documents heretofore marked Defendant's Exhibits F through S, both inclusive, were received in evidence.)

[See Book of Exhibits.]

Mr. Harris: Next, if the court please, I wish to offer into evidence the deposition of Eugene L. Hammond, taken on [364] November 16, 1955, as defendant's exhibit next in order.

The Clerk: That would be Defendant's Exhibit Z.

* * * * *

The Court: All right.

(The deposition referred to was marked Defendant's Exhibit Z, and received in evidence.)

DEFENDANT'S EXHIBIT Z

[Title of District Court and Cause.]

DEPOSITION OF EUGENE L. HAMMOND
taken pursuant to Notice of Taking Depositions,
under the Federal Rules of Civil Procedure for the
District Courts of the United States, before Ralph
E. Nelson, a Notary Public in and for the County
of Hennepin, State of Minnesota, on the 16th day
of November, 1955, at 950 Pillsbury Building, Min-

neapolis, Minnesota, commencing at 10:00 o'clock, a.m.

Appearances: Williamson, Schroeder, Adams & Meyers, by Everett J. Schroeder, Esq., 950 Pillsbury Building, Minneapolis 2, Minnesota, appeared as counsel for and in behalf of plaintiffs.

Harris, Kiech, Foster & Harris, by John Hofeldt, Esq., 417 South Hill Street, Los Angeles 13, California, appeared as counsel for and in behalf of defendant. [1]*

Mr. Schroeder: I hand the court reporter the original copy of the Notice of Taking Depositions, to be secured to the copy of the depositions when prepared. These depositions will be taken pursuant to the Federal Rules of Civil Procedure of the District Courts of the United States.

Will you swear the witness, please.

Whereupon,

EUGENE L. HAMMOND

was called as a witness and, having been first duly sworn, testified as follows:

(Discussion off the record.)

Direct Examination

Q. (By Mr. Schroeder): Will you state your name, please? A. Eugene L. Hammond.

Q. And your address?

A. 8542 Third Avenue South, Minneapolis, Minnesota.

[*Page numbering appearing on Defendant's Exhibit Z, Deposition of Eugene L. Hammond.]

(Deposition of Eugene L. Hammond.)

Q. And your occupation?

A. I am a sales manager for the Minnesota Mining and Manufacturing Company, Ribbon Division.

Q. And you are stationed then at the St. Paul office?

A. Branch, yes, sir.

Q. Did you say you were sales manager?

A. Yes, sir. [2]

Q. You don't actively sell then, is that correct?

A. Oh, yes.

Q. Oh, you do. What territory do you cover?

A. I cover eleven states in the Midwest.

Q. Does that include Minnesota?

A. It does.

Q. What are your duties in your present position?

A. To promote the sale of the gift wrap material which my company manufactures.

Q. Is your activity limited to gift wrapping particularly?

A. Yes, sir.

Q. How long have you held that position?

A. My title of sales manager, since the first of this year, 1955.

Q. When did you go into the present work of promoting gift wrappings?

A. In 1950.

Q. And have you been involved in that activity continuously since 1950?

A. Yes, sir.

Q. Do your duties involve calling only on prospective purchasers of gift wrappings then?

A. That's correct.

Q. What were you doing prior to 1950?

(Deposition of Eugene L. Hammond.)

A. I lived in Duluth, Minnesota, and I had a Scotch [3] cellophone tape territory.

Q. By that, do you mean you were in the employ of Minnesota Mining and Manufacturing Company?

A. That's correct.

Q. What was your position at that time?

A. Salesman.

Q. And you worked directly for Minnesota Mining and Manufacturing Company?

A. That's correct.

Q. You were not an independent dealer then, is that correct?

A. No, sir, I was employed by Minnesota Mining.

Q. And you were directly responsible to whom at that time?

A. To several people, depending on the period.

Q. Well, will you name them, please?

A. Mr. Jack Young was my sales manager when I first went up there.

Q. And what was his position?

A. He was the sales manager.

Q. For Minnesota Mining and Manufacturing Company? A. Yes, sir.

Q. And who were the others?

A. He was succeeded by a Mr. Harold Groth acting in the same capacity.

Q. Were there any others to whom you were directly responsible? [4]

A. A Mr. Ed Decker succeeded Mr. Groth.

Q. And were there any others?

(Deposition of Eugene L. Hammond.)

A. Not in that period.

Q. Then you have given me the names of three gentlemen under whom you worked directly up until the time when you received your assignment to the promotion of gift wrapping tape, is that correct?

A. That's correct.

Q. And does that include all of the men under whom you worked directly?

A. I was directly responsible to those three, yes, sir, at various times.

Q. Was there anyone else to whom you were directly responsible prior to 1950?

A. We had sales supervisors, but actually, I still remained responsible to those people that I have named.

Q. Who was your sales supervisor?

A. Mr. Harold Kosanke was one of the sales supervisors, and there was one other, Ray Fagen, R. F. Fagen I believe it is.

Q. Have you ever seen a pair of cans taped together in an end-to-end relationship?

A. Yes, sir, I have.

Q. When did you first see such a pair of cans?

A. The early part of 1949.

Q. When did you first hear of such a pair of cans being taped together?

A. That was the first, to the best of my—

Q. You had never heard of it prior to seeing it, is that correct?

A. I had never seen it before.

Q. Had you heard of it prior to seeing it?

A. No, sir.

(Deposition of Eugene L. Hammond.)

Q. And where did you first see these cans taped together? A. At Chun King Sales in Duluth.

Q. And you had never heard, prior to that time, of anyone else taping them? A. No, sir.

Q. While you were on duty in Duluth in 1949, was it part of your job to call on Chun King Sales?

A. Yes, sir, it was.

Q. And did you sell tape to them? A. I did.

Q. What kind of tape did they purchase?

A. Half by 2592 Cellophane tape, and it was colored. They also purchased, previous to that time, smaller rolls for their office use.

Q. You say that previous to that time, they purchased smaller rolls for the office use. What were the other rolls used for?

A. They were used to seal tins.

Q. By that, do you mean that the tape was utilized to seal the contents of the can?

A. No, sir, two tins together.

Q. And what was the number they used of the tape?

A. No. 600 was the way we designated colored—or I mean Cellophane tape, and then we also have to designate the color if we wish a color.

Q. Does the 600 refer to all types of Cellophane tape? A. It refers primarily to Cellophane—

Q. Tape generally. A. Yes, sir.

Q. And you could get the different colors under the No. 600, is that correct? A. Yes, sir.

Q. Are you qualified to comment on the merits of the various types of tape?

(Deposition of Eugene L. Hammond.)

A. I don't know that I am at present, but I was then.

Q. You were then? A. Yes, it was my job.

Q. Do you happen to know, was that No. 600 that they purchased the same tape that Minnesota Mining and Manufacturing Company is presently selling under the No. 600?

A. To the best of my knowledge, yes. [7]

Q. You have never heard of any changes having been made in that tape?

A. Periodically, we have changes for the improvement of the tape. I don't know anything about that however. It's of a technical nature, and I am not qualified.

Q. You are not qualified then? A. No, sir.

Q. Who did the purchasing for Chun King Sales, Inc. in 1949 and 1950?

A. Well, now, this is 1949.

Mr. Hofeldt: Purchasing what?

Mr. Schroeder: Tape.

Mr. Hofeldt: Of tape?

Mr. Schroeder: Yes.

The Witness: For the office use, I don't recall. For the material being used in the factory, Jeno Paulucci originally gave me the first order.

Q. (By Mr. Schroeder): He did?

A. Yes, sir.

Q. Something you said sounded as if you were not selling tape to Chun King in 1950. Were you?

A. No, I was not.

Q. You were not. A. No, sir.

(Deposition of Eugene L. Hammond.)

Q. You sold to them only in 1949? [8]

A. '49.

Q. When did you discontinue selling to them in '49? A. October 1st of 1949.

Q. Why did you discontinue selling to them?

A. My responsibilities for industrial accounts were relieved from me at that time.

Q. I see. Do you recall when you first made sales to Chun King Sales, Inc. for the purpose of taping cans together?

A. In the early part of '49 sometime.

Q. Do you recall the month?

A. I do not remember exactly, but it was early spring, late winter, something like that.

Q. Of 1949? A. 1949.

Q. You stated that the first order was placed by Mr. Paulucci? A. Yes, sir.

Q. Were orders placed at a later date by other people in Chun King Sales, Inc.? A. Yes, sir.

Q. Who placed those orders with you?

A. To the best of my recollection, I think it was Jim Bingham.

Q. You are not sure?

A. I am not sure. By that, I mean, I don't know that he [9] put the ultimate stamp of approval on an order, or whether or not he would state what he needed and then have it approved; that I don't know.

Q. Was he the man you dealt with?

A. Yes, sir.

(Deposition of Eugene L. Hammond.)

Q. Is he the only one you ever sold to outside of Mr. Paulucci? A. Yes, sir.

Q. Where would you contact Mr. Paulucci when you went up to Chun King Sales, Inc.?

A. They were located on Lake Avenue at that time right next to the famous Duluth lift bridge there. I don't remember the address—5 something, Lake Avenue.

Q. Would you visit Mr. Paulucci in his office?

A. Yes, sir.

Q. Where would you contact Mr. Bingham?

A. Usually in his office, which was back in the factory.

Q. Back in the factory. Just where in the factory was Mr. Bingham's office?

A. Well, relative to the floor plan, it was, as I recall, on the same floor as the office was located—which I don't remember what floor it was—but to the left as you went into the factory location.

Q. I see.

A. I do recall the Inspector, the Government Inspector's [10] office, was right next door to him.

Q. Did Mr. Paulucci at any time ever render any complaint about the quality of the Minnesota Mining tape at that time? A. Not to me.

Q. He never did to you? A. No, sir.

Q. Do you know that he did to anyone else?

A. That I don't know.

Q. So far as you know, Chun King Sales, Inc. was completely satisfied with the tape they received in 1949? A. Yes, sir.

(Deposition of Eugene L. Hammond.)

Q. Did Mr. Bingham ever make any complaints to you as to the quality of tape?

A. I think I recall difficulty in the tape along the adhering—I don't know if I can exactly say it right—there was some difficulty in having the tape stick to the tins. Ruffling, I think, is what it was.

Q. Yes.

A. I don't know what that involved, I mean, what the difficulty was involved, whether it was not enough pressure applied, or what the difficulty was.

Q. Well, were they specific as to what the results were?

A. Ruffling was the end result.

Q. Well, were they complaining about the appearance then, or that the cans were coming apart?

A. I don't remember.

Q. You don't remember at all, but you do remember there was some complaint then?

A. Yes, sir.

Q. They didn't make the complaints to you though?

A. Mr. Bingham, of course, would.

Q. He did make them to you, and what did you do about that?

A. I suggested other types of tapes.

Q. Did they try different types of tapes?

A. I sampled them, as I recall, with a No. 700 series, which is of an acetate.

Q. Did Chun King Sales, Inc. people try this different type? A. No, sir.

Q. They didn't try them?

(Deposition of Eugene L. Hammond.)

A. Not to my recollection.

Q. You offered them to them, but they disregarded your advice?

A. That I couldn't tell you.

Q. Then you don't know whether or not they tried to use these different tapes?

A. I don't recall.

Q. Did Chun King Sales, Inc. purchase much tape at that time?

A. I was very pleased with the volume of sale.

Q. Could you estimate the amount?

A. The first order, I think, was fairly sizable; it was 144 rolls, as I recall, but that later was not a big order in proportion to what they were purchasing at a later date.

Q. That they subsequently used, is that right?

A. Yes, sir.

Q. Do you have knowledge of any complaints of this No. 600 tape coming from other users?

A. I don't understand your question.

Q. Well, in 1949, did you ever hear of any other complaints about the nature of this tape No. 600?

A. From any source?

Q. From any source. A. Yes, sir.

Q. What were they?

A. Cellophane requires a certain amount of moisture. If it is left on a dispenser and not utilized, say, in the wintertime, in particular, with artificial heat, it will sometimes lose its stretching ability and will break, upon rolling it from the roll.

(Deposition of Eugene L. Hammond.)

Q. Then this No. 600 tape does stretch somewhat?

A. Yes, sir, to my recollection.

Q. It does.

A. There is a small amount of stretch in it.

Q. There is a small amount of stretch in it?

A. Yes.

Q. What is the nature of that characteristic with respect to the amount of tension required to make it stretch?

A. That I couldn't tell you.

Q. You don't know, but you do know that it did stretch? A. Yes, sir.

Q. Well, did you ever hear of any other user complaining, any specific user?

A. No, sir, I can't recall.

Q. You can't recall any other, but you do know that there were some complaints about it?

A. Yes, sir, we—I had some complaints.

Q. You had them yourself? A. Yes, sir.

Q. Do you remember who they were from?

A. No, sir, I do not.

Q. All that you recall is that there were some complaints? A. Very small users usually.

Q. What did you do in response to these complaints which you received?

A. I usually replaced the tape if it was justified.

Q. And let it drop there? A. Yes, sir.

Q. Would you make any report to your company on that complaint? [14]

(Deposition of Eugene L. Hammond.)

A. Yes, sir, I would.

Q. Then you wouldn't let it drop?

A. Excuse me. Yes, that's right.

Q. Would you ask your company to take steps to rectify the cause of the complaint?

A. There were means whereby that wouldn't be necessary. We have instructions on each tin which would relieve that situation.

Q. What were those instructions?

A. A small blotter placed in the tin of each Cellophane taped can asking that if the material did become dry, to moisten the blotter and seal it, seal the tin.

Q. But if you received the complaint from a user, you would normally forward that to your company, would you not?

A. Yes, sir.

Q. And ask them to do something about it?

A. Yes, sir, usually we asked permission to replace, if it was justified.

Q. Throughout this period, until you were relieved of your duties in 1949 then, did you know of anyone else utilizing tape for taping two cans together in an end-to-end relationship?

A. No, sir.

* * * * *

Q. (By Mr. Schroeder): When you were contacting Mr. Paulucci and Mr. Bingham in an attempt to make sales to Chun King Sales, Inc., were you generally in the portion of the plant where the actual preparing operations were taking place?

A. Yes.

(Deposition of Eugene L. Hammond.)

Q. You were not in their office then, is that correct? A. I would be there also.

Q. Well, what occasion would you have for being in the plant itself?

A. Because I dealt with Mr. Bingham after the initial or the established use of this particular tape had been made.

Q. I see. Then you didn't make the sales in his office then as you testified previously?

A. In Mr. Bingham's office?

Q. Yes.

A. That would be where I would usually get the order, yes, sir. However, that was on the same floor as the operation was taking place.

Q. In so doing, which portions of the plant would you most frequently pass through? When I speak of "portions of the plant," I am referring to the operations.

A. I was all over that whole plant. If I went to see Mr. Bingham, it would be necessary for me to trace him down, wherever he might be.

Q. I see.

A. But I generally contacted him in his office or on the same floor where the operation, the tape operation, was taking place.

Q. Why would you contact him where the tapping operation was taking place? [20]

A. To see the operation.

Q. I see.

A. I also replaced blades on the dispensers, so hence, I did see the operation.

(Deposition of Eugene L. Hammond.)

Q. Were those dispensers provided by your company?

A. They are manufactured under our specifications.

Q. Was it part of your business to replace these blades?

A. Yes, sir, part of our service.

Q. And in so doing, did you observe the taping operations?

A. I did.

Q. Did you study them carefully?

A. That I can't say. I was very aware of the use that the tape was being put to.

Q. In other words, you knew that the tape was being used to tape two cans together?

A. Yes, sir.

Q. No doubt in your mind about that?

A. Positive.

Q. Did you study the operation carefully so that you would know exactly how it was done?

A. Yes, sir.

Q. You could——

A. One qualification: Exactly how it was done?

Q. Yes.

A. I am relying on my memory.

Q. Well, of course; you have to.

A. Yes.

Q. Could you repeat exactly how that operation was performed?

A. I can generally give you the layout if that will help.

Q. Well, I want to know how carefully you observed this operation. Did you observe it carefully

(Deposition of Eugene L. Hammond.)

enough so you could be sure you could repeat it exactly as it was performed?

A. I can't exactly repeat.

Q. It was more or less of a fairly casual observation then?

A. I would not say casual. I am quite aware of his operation.

Q. You had been made aware of it?

A. No, sir, I remember it distinctly.

Q. You remember it, but you didn't observe it carefully enough so you could reproduce it exactly, is that it?

A. If you would like to have me go over the operation, I think that——

Q. Well, I would like to know first of all whether or not you feel that you know exactly how it was performed.

A. Generally.

Q. Generally?

A. Yes.

Q. All right. You had no occasion to observe this operation subsequent to October, 1949 then, is that correct?

A. After October?

Q. Yes.

A. No, sir.

Q. So you are speaking then only from the early part of '49 to October, 1949 in the operation?

A. Yes, sir.

Q. Would you describe as best you can then this taping operation?

A. All right. There were heavy-duty dispensers which held the pressure-sensitive tape. The operators sat with the blade away from them — sat or stood, I don't recall.

(Deposition of Eugene L. Hammond.)

Q. You don't remember whether they were standing up or sitting down?

A. I do not remember.

Q. I see.

A. There was an angle iron placed in the center of the table generally; two tins were placed in the angle iron; the tape was then applied to the beading of the two tins. The operator then applied the tape, the free end of the tape, to the tins, and then the material was placed around the tins.

Q. The tape was wrapped around the tins?

A. Yes, sir.

Q. I see. Was the tape cut off from the dispenser before they proceeded to wrap the tape around? [23]

A. I don't remember.

Q. You don't remember. All you know is that they had an angle iron, they placed the cans in it——

A. They had dispensers.

Q. And they had dispensers; they pulled the tape out——

A. They pushed the tape away from them.

Q. They pushed the tape away from them?

A. Yes, sir.

Q. And the dispenser was directly in front?

A. That's correct.

Q. And they tabbed it on the cans?

A. The ends of two tins.

Q. Yes, the adjacent ends.

A. Yes, sir.

Q. The ends abutting? A. That's right.

Q. And then did they tear the tape off?

(Deposition of Eugene L. Hammond.)

A. I don't recall that.

Q. You don't recall that, but you know they wrapped the tape around the can?

A. Applied it at that stage.

Q. But actually, you are sure only of this much, is this correct, that they used the tape, and they used the dispenser, and they used a V-shaped trough, placed the cans in end to end, applied the tape to it, and then somehow wrapped the tape around the cans; you are sure of that?

A. Yes, sir.

Q. That is all you are sure of?

A. Yes, sir.

Q. You can't describe it any more adequately than that? A. No, sir.

Q. Do you recall whether or not the girls or Mr. Bingham ever complained that their hands got sore from using this tape? A. Yes, sir, I do.

Q. They did? A. Yes.

Q. Did they complain that it cut their fingers?

A. Specifically, their thumb.

Q. Their thumb, I see. Did they wear any guards on their fingers? A. Adhesive tape.

Q. Did practically all the girls have the adhesive tape? A. That I don't recall.

Q. Is there anything you could state about the relative positions of the V-shaped trough and the dispenser other than that the dispenser was directly in front of the operator?

A. I don't understand your question.

Q. Well, was there any peculiar relationship

(Deposition of Eugene L. Hammond.)

that you know of between the dispenser and the trough? [25]

A. The only odd thing about it that I recall, why I distinctly remember it, was the fact that the dispenser was made so that you usually pull the tape with the blade toward you rather than working with the blade away from you. Therefore, the dispenser was lined up close to the operator, the V-trough was in the center generally of the table, and the cans were placed in the trough.

Q. How wide was the table, as a rule?

A. The average width of a table. It was long.

Q. It was long? A. Yes, sir.

Q. When you say "across the width," you are speaking of transverse to the table now, is that right?

A. Well, they were sitting as we are right now, and as I am in particular, in relation to the length of the table. They were at right angles.

Mr. Schroeder: Let the record show that the witness is facing at right angles to the length of the table.

Q. (By Mr. Schroeder): How wide were these tables? A. (No response.)

Q. You do not recall?

A. They did not appear to me to be out of the usual in width.

Q. Can you say how far the dispenser was from the V-shaped trough? A. I do not know.

Q. So then all that you really know is that the

(Deposition of Eugene L. Hammond.)

dispenser was in front of the taper, and the trough was on the table ahead of them?

A. Yes, sir.

Mr. Hofeldt: Mr. Schroeder, "ahead of them"; I don't quite understand.

Mr. Schroeder: Ahead of the taper. Shall I add, "beyond the dispenser"? It's all right with me.

Mr. Hofeldt: Yes. Was the dispenser between the operator and the V-shaped trough?

The Witness: The dispenser was between the operator and the V-shaped trough.

Q. (By Mr. Schroeder): Do you recall any specific request by Mr. Bingham or Mr. Paulucci for a stickier tape?

A. No, I do not recall that.

Q. Do you recall them ever referring to complaints that their cans were coming apart?

A. Never once——

Q. Never once.

A. (Continuing): ——do I recall.

Q. Do you recall them complaining that the tape was breaking?

A. I never had that complaint to my recollection from Chun King. [27]

Q. Do you recall any complaint to the effect that the tape was breaking as it was being pulled from the roll?

A. I don't recall that either.

Q. As far as you know, Chun King Sales, Inc. was a very satisfied customer then, is that correct?

A. Yes, sir.

(Deposition of Eugene L. Hammond.)

Q. Did Chun King Sales, Inc. continue to buy tape from you at all times up until October, 1949?

A. Yes, sir.

Q. Do you know if they ever bought tape from other companies? A. I don't recall that.

Q. Do you recall Mr. Paulucci or Mr. Bingham ever stating anything about the relative merits of your tape as compared to other tape?

A. That I don't recall either.

Q. Do you recall Chun King Sales, Inc. or Mr. Paulucci or Mr. Bingham ever suggesting that Minnesota Mining and Manufacturing Company could help them to speed up this taping operation?

A. I don't recall any specific instance along that line.

Q. Were there any such steps taken by Minnesota Mining and Manufacturing Company?

A. Not while I was in the responsibility of that account.

Q. Do you know of any, of your own knowledge, since then?

A. I don't know. I would—I really don't know.

Q. Did you ever call at Chun King Sales, Inc. when they were not taping cans together in an end-to-end relationship?

A. You mean during the period that they had been?

Q. Yes.

A. Yes. In other words, when the line was not working?

Q. Yes.

(Deposition of Eugene L. Hammond.)

A. That particular production line?

Q. Yes. A. Yes.

Q. Was that quite frequent?

A. That I couldn't recall. There were times.

Q. There were times when they were not taping?

A. Yes.

Q. Did Mr. Paulucci or Mr. Bingham ever ask you to provide rolls of tape so that they could send them to their brokers to retape cans?

A. Not once to my recollection.

Q. What does a roll of that tape cost approximately? A. That I couldn't tell you.

Q. Do you have any idea what it sold for at that time? A. I don't even remember that.

Q. You don't?

A. No, sir. I can remember the approximate cost.

Q. What was the approximate cost?

A. I believe it was around \$1.20.

Q. A roll?

A. Yes, sir. That could vary, of course, because of quantity.

Q. Did they always use one-half inch width?

A. That's the only thing that I ever sold them for that purpose.

Q. How many tapers did Chun King Sales, Inc. have during the time that you observed them?

A. Something over six. I believe that it was more than six. However, I don't know how many more.

Q. You don't recall ever seeing less than six?

(Deposition of Eugene L. Hammond.)

A. No, sir.

Q. How long would it take a girl to tape two cans together? A. I have no idea.

Q. No idea at all. Could you approximate the number of cases a girl would tape in one day?

A. I have no idea.

Q. Yet you did see this operation quite frequently? A. Oh, yes, oh, yes.

Q. Would you say it would take over a minute to tape the cans?

A. I would say somewhat less than that.

Q. Somewhat less than a minute? A. Yes.

Q. Did you ever call on Chun King Sales, Inc. subsequent to their moving to their new plant?

A. No, sir, I have not called on them since October of 1949.

Q. And they moved subsequent to that date, did they? A. I assume they have.

Q. Have you been to Duluth since then?

A. Yes, sir.

Q. And have you observed that they have moved? A. No, sir.

Q. How did you know they had moved?

A. I am acquainted with salesmen who live—our salesmen who live in the Duluth area.

Q. I see, and they have told you that they are no longer at their old location?

A. Yes, sir, and I was in Duluth during vacation period too, and I happened to go by that old location.

(Deposition of Eugene L. Hammond.)

Mr. Schroeder: That is all I have. Do you want to cross examine?

Mr. Hofeldt: Yes.

Cross Examination

Q. (By Mr. Hofeldt): Now, Mr. Hammond, you have testified you are a sales-manager for Minnesota Mining and Manufacturing Company, Ribbon Division. Are you an officer of that company?

A. No, sir.

Q. You are merely an employee of that company? A. Yes, sir.

Q. As a Cellophane tape salesman for Minnesota Mining in the year 1949—which I believe you testified was your position at that time? A. Yes.

Q. (Continuing): —just generally, what were your duties?

A. I was responsible for retail, consumer and industrial usages of Cellophane tape. I had what we call a combination territory.

Q. Did you have many industrial users in the Duluth area? A. Very few.

Q. In the year 1949, how did Chun King Sales rate as an industrial user in your territory?

A. It was my largest industrial account.

Mr. Schroeder: Excuse me, John. Off the record.

(Discussion off the record.)

Q. (By Mr. Hofeldt): Have you had anything to do with industrial sales of Cellophone tape since October, 1949? A. No, sir.

Q. Now, you gave some figures, which I assume

(Deposition of Eugene L. Hammond.)

were dimensions of tape, of the type of tape you sold to Chun King Sales for this taping operation. You said "one-half by 2592." What does the one-half mean? [32]

A. One-half inch wide and 2592 inches long.

Q. And you stated that tape was colored?

A. Yes, sir.

Q. What colors did you sell to Chun King Sales, if you recall?

A. Well, my recollection is that they were—it was split. Of 144 rolls, that first initial order, it was 72 rolls of green and 72 rolls of red.

Q. You remember the actual number of rolls sold in that first order? A. Yes, sir, I do.

Q. Is there any reason for the memory?

A. Well, they were trying to get a tape color that would harmonize with the labels of the tins that Chun King Sales were going to offer on a one cent sale basis, making one unit out of two tins, in other words. I believe there were two items they had, so hence they had two colors.

Q. Now, this first order: How did you happen to get that order—from Mr. Paulucci, I believe you testified?

A. My initial contact had been with the office. I made a call there with a jobber salesman—which was part of my duty to work with jobbers in the area—and I believe that I was familiar with the account because I had called on the office, and at that time, I don't think I pursued it any further than that. I received a phone call from Chun King

(Deposition of Eugene L. Hammond.)

Sales at my home, and I believe it was during the early part of 1949 that this all took place. So I went down there at their request; I made that call at their instigation.

Q. Did they tell you at the time what they wanted this tape for?

A. It evolved during the conversation what the need for the tape was. I was quite aware at that time that they planned to tape the two tins together and offer it as a one cent sale unit.

Q. Do you mean by that that you were aware of their use for this tape before you got the order?

A. Yes. It led up to the order.

Q. Who gave you that first order?

A. Mr. Paulucci.

Q. Did you deliver that tape?

A. They were in a great rush for it, as I recall, and I think that I telephoned St. Paul branch sales office and had them put the material on a bus, and I picked it up the next morning at the bus terminal and delivered it to them.

Q. When you delivered this tape to them on the next morning, did you stay around to watch the operation?

A. I can't recall; I can't recall.

Q. You had occasion later to observe this operation?

A. Yes, sir.

Q. Can you give us an idea how often?

A. All I can say is, frequently. I don't recall how often; that is, whether it was once a week—I know that it was once a week there at first, and

(Deposition of Eugene L. Hammond.)

later, as the operation smoothed down, it would require less attention. I also had the rest of my territory to cover, so I don't believe that it remained constant at once a week or so or more often than that.

Q. You mean throughout this entire period, you saw this operation at least once a week?

A. No, sir, in the early parts. Later, maybe two weeks or maybe three weeks would go by.

Q. Now, you stated that this was a No. 600 tape, and you also stated, I believe, that it was a stretchy tape, is that correct?

A. No. 600 at that time designated a Cellophane backing tape, and there is a certain amount of stretch in Cellophane tape.

Q. Did Mr. Paulucci ask for a No. 600 tape?

A. No, sir.

Q. Who suggested it?

A. It was my suggestion.

Q. What reason, if any, did you have for suggesting that particular tape?

A. As I recall, there would be two reasons: One, we have that immediately available, and two, it's a little less expensive than some of the other types of tape. Or may I change that. It was a little less expensive than other types of tape.

Q. Now, you stated that Mr. Bingham complained about the difficulty in the tape adhering. What do you mean by "adhering"?

A. Sticking.

Q. Sticking to what?

(Deposition of Eugene L. Hammond.)

A. Sticking to the object that it's placed against.

Q. You mean it just fell off of the tins?

A. Cellophane pressure-sensitive tape requires a certain amount of pressure to make it adhere.

Q. Now, you spoke, in regard to this adhering, of ruffling, is that correct? A. Yes, sir.

Q. What is ruffling; what do you mean by that?

A. Well, if the proper amount of pressure isn't placed against something that is circular, the edges will ruffle.

Q. Now, these cans that they—by “they,” I mean Chun King Sales—were taping together, did they have beads on them? A. Yes.

Q. What do you understand by the term “beads”?

A. It's a ridge on the top and bottom of a tin.

Q. On the very top and bottom? [36]

A. It's along the side of the top—around the side of the top, I should say, to describe beading.

Q. Now, did the width of the tape exceed the width of the two beads?

A. I would say slightly.

Q. Did the tape adhere only to the beads, or did it adhere to the side of the can as well?

A. I don't know.

Mr. Schroeder: Off the record.

(Remarks off the record.)

Q. (By Mr. Hofeldt): Well, I don't understand what this ruffling is.

A. A ruffle—Well, let's assume that you have a circular object, and there is a ridge on this circu-

(Deposition of Eugene L. Hammond.)

lar object, such as a can of food of some sort. If we understand what the beading is, there is a ridge on the edge of the tin. The tape, if a proper amount of pressure was not applied to that, would not conform to the edges, and would therefore produce a ruffling effect. Instead of a smooth appearance, it would have waves in it.

Q. Well, was this ruffling a common occurrence in the taping operation of cans in an end-to-end relationship by Chun King?

A. There was some ruffling.

Q. Did you observe any cans in which there was no ruffling? A. Yes, sir.

Q. In those cans, did the edges of the tape adhere to the sides of the cans immediately adjacent to the beads?

A. Well, let's say if an operator did not do a good job, there would be some tape adhering to the edge of the tin. If they didn't get it perfectly around the center holding the two tins together, there would be a waving or a weaving, let's say.

Q. And if they did apply it perfectly, what then happened? How did the tape look on the beads and on the adjacent portion of the cans?

A. As I recall, our first samples, on which we, of course, took care to apply the adhesive, the tape, to it, the appearance was very pleasing in that the tape would conform to the beading. Now, I don't know how wide the two beads would be, so therefore, I don't know whether or not the tape would extend beyond the beading.

(Deposition of Eugene L. Hammond.)

Q. But it did conform in some instances to the beads of the cans? A. Yes, sir.

Q. And how often did that occur where it did conform to the beads of the can as compared to this ruffling?

A. Well, I would say generally it conformed. That was what they were aiming at, of course. It would be a better appearing unit.

Q. And how, if you know, did they make it conform to the beads of the cans?

A. How do I know?

Q. How, if you know, did they make it conform? A. I don't know.

Q. Now, you stated that in relation to this ruffling problem that Bingham mentioned to you, that you then suggested other types of tape, and I believe you mentioned a No. 700 acetate?

A. Yes, sir.

Q. Why did you suggest that particular type of tape? A. I don't remember.

Q. Is it a stretchy tape?

A. To the best of my recollection, it has a little less stretch than Cellophane.

Q. And you mentioned on your direct examination that at times, Cellophane tape of the type you were furnishing to Chun King lost its stretching ability due to the drying out of the Cellophane because of artificial heat in the wintertime. Was that a complaint of Chun King?

A. That I do not recall.

Q. Did Chun King order this tape that they

(Deposition of Eugene L. Hammond.)

were using for the taping operation of cans end-to-end on a fairly steady basis? A. Yes, sir.

Q. Did they, if you know, use the tape quite soon after it was received?

A. Yes, sir. In fact, they were usually in a hurry for it. It was on a rush basis.

Q. I think everyone else here understands—and I don't—the relationship of this equipment to the other equipment and to the operator. Now, where was the operator in relation to the table?

A. Sitting alongside it—or standing. Now, that's a point I don't recall. I can't recall whether they were standing or sitting.

Q. Where, in relation to the operator, was the dispenser? A. Directly ahead of them.

Q. And now, taking the dispenser, the roll of tape, in relation to the cutting blade on the dispenser, in what direction did the dispenser face?

A. Away from them.

Q. By "away," what do you mean?

A. Generally, the dispenser is designed to pull the tape toward you before you cut it off. In this respect, it was reversed. The blade was facing away from the operator, so hence they had to push the tape away from them to make it unwind from the roll.

Q. Was the roll of tape on the dispenser closer to the operator than the cutting bar was?

A. Yes, sir.

Q. All right. Now, with respect to the angle iron,

(Deposition of Eugene L. Hammond.)

I guess you called it, where was it in regard to the dispenser?

A. It was farther away from the operator than either the dispenser or the cutting edge on the dispenser.

Q. Now, starting with the operator, you had the dispenser? A. Correct.

Q. The cutting bar to the dispenser was away from the operator? A. Yes, sir.

Q. The angle iron was further away?

A. Yes, sir.

Q. In relation to the dispenser, the angle iron was closer to the cutting bar than it was to the roll of tape on the dispenser? A. Repeat that.

Q. Well, let me rephrase that question. Was the angle iron closer to the cutting edge of the dispenser than it was to the roll of tape on the dispenser? A. Yes, sir.

Mr. Schroeder: Will you repeat that question, please.

(The question was read by the reporter.)

Q. (By Mr. Hofeldt): I am going to show you figure 3 of a copy of the Paulucci Patent No. 2679281, dated May 25, and entitled "Method and Means for Securing Cans Together"—

Mr. Schroeder: I object to any question on that, John, on the ground it's outside the scope of the direct examination.

Mr. Hofeldt: Well, I am trying to get at the relationship of the various pieces of equipment,

(Deposition of Eugene L. Hammond.)

and I am using this merely for illustrative purposes with the witness.

Mr. Schroeder: Why don't you use just a piece of paper?

Q. (By Mr. Hofeldt): Calling your attention to figure 3 of the Paulucci Patent, is the angle iron there and the tape dispenser in the relationship that they were when you observed that in 1949 at the Chun King Sales factory?

A. Yes, they—they are.

Q. Calling your attention on figure 3 to the numeral 2, does that look like the dispensers that were used? A. Yes, sir.

Q. Is the cutting bar in the same place on that picture, on figure 3, as it was in the operation of Chun King in 1949? A. Yes, sir.

Q. Now, this angle iron: What was roughly its shape? A. V-shape.

Mr. Hofeldt: Just off the record.

(Remarks off the record.)

Q. (By Mr. Hofeldt): Was the corner of the V-shaped angle down in the Chun King operations in 1949? A. Next to the table, yes.

Q. It rested on the table? A. Yes, sir.

Q. Was the V-shaped angle iron attached to the table? A. I don't remember.

Q. Do you recall that it was necessary to hold the angle iron from falling over on its side?

A. I don't recall how it was.

Q. But it was with the two legs of the V up in the air?

(Deposition of Eugene L. Hammond.)

A. Gravity would say that it would have to be supported.

Q. Now, these dispensers that were furnished to Chun King—did they have rubber feet on them?

Q. Yes, sir. Correction: I believe that they purchased them.

Q. Now, you were asked on direct examination about the distance of the dispenser from the V-shaped trough, and I don't recall your answer.

A. I don't recall what the distance was.

Q. Well, there was some distance between the two? A. Yes, sir.

Q. Now, you were also asked about some complaints about cans coming apart, and you said you knew of none. Did you ever have any complaints about scuffing of the tape?

A. There was one. To apply the tape, the tins apparently had been rotated in this one instance, and it marred the appearance on the outside of the tape.

Q. Around the beads of the cans?

A. That's right; that's right.

Q. When you observed this operation on the several occasions you have mentioned at the Chun King plant, did you observe the cans being rotated as the tape was being applied to them?

A. Vaguely in my memory, yes.

Q. Now, the tape that was sold to Chun King Sales throughout this period—was it this No. 600 tape?

A. To the best of my knowledge.

(Deposition of Eugene L. Hammond.)

Q. And they were industrial rolls, I believe you said? A. They were a standard size roll.

Q. And that is 2592 inches in length?

A. Yes, sir.

Q. Did Chun King to your knowledge have any other use for this No. 600 tape?

A. Not to my knowledge.

Q. Now, you mentioned they did purchase Cellophane tape for office use? A. Yes, sir.

Q. Was that in large quantities?

A. Very small quantities, and a different sized roll.

Q. Approximately, what is the diameter of a 2592-inch roll of Cellophane tape?

A. I know the core size.

Q. And what is that?

A. It's three inches. I don't know what the outside diameter with a full roll of 2592 inches of tape would be, but quite often that is referred to as a three-inch diameter core.

Q. And then the convolutions of the tape around—— A. Would be larger than that.

Q. (Continuing): ——would add to the size of the core? A. The circumference, yes, sir.

Q. This half-inch width of tape that was used by Chun King Sales—who suggested that particular width, if you recall?

A. I believe that we tried in the initial interview several widths that I had with me, which I would have in my samples. I would have a three-quarter inch width and a half-inch. Those were

(Deposition of Eugene L. Hammond.)

the two most popular widths. And I believe it was—we settled on the half-inch width, because it did the job adequately and, of course, reduced the costs as opposed to the wider widths.

Q. You mentioned “we” tried. Who was that?

A. As I recall, there was Mr. Paulucci, and myself, and there was one other person in the room, an older fellow.

Q. Do you recall his name?

A. Lee, I think; I’m not sure.

Q. Did you yourself, on this first occasion that you have testified about, try to put tape around the beads of the cans? A. Yes, sir.

Q. Would you describe how you did that?

A. I don’t remember too much about it.

Q. Did you apply any pressure to the tape as you were applying it?

A. I would normally apply it, because as a salesman I would wish to make the tape appear in its best possible role.

Q. Did you try the three-quarter inch tape?

A. I don’t remember whether I did directly or not.

Q. Why was it decided not to use three-quarter inch tape, if you know?

A. I don’t know why actually, but I assume—Maybe I shouldn’t do that.

Q. I forgot to ask you: In relation to figure 3 of the Paulucci Patent, where was the operator, looking at this?

A. On the right-hand side of the diagram here.

(Deposition of Eugene L. Hammond.)

Q. By "the diagram," you mean figure 3?

A. Figure 3.

Q. Now, you have mentioned that there was some trouble with regard to the operators' fingers in cutting the tape lengths, that they cut their fingers and had to use adhesive tape around them to protect their fingers, is that correct?

A. Specifically, their thumb.

Q. Specifically, their thumb, and how did they injure their thumb?

A. The dispenser blades are of a serrated type, and they are manufactured, produced, very hurriedly, they are quite inexpensive, and therefore, they have jagged edges sometimes, and I would assume it's because they were working with a dispenser in an abnormal position, which placed the blade in an awkward position to cut the tape.

Q. To cut a piece of tape by use of the blade on the dispenser, does the tape away from the blade have to be taut?

A. The tape away from the blade?

Q. Away from the blade and away from the roll.

A. Yes, sir.

Q. To use the cutter bar, it has to be taut?

A. Yes, sir.

Mr. Schroeder: Were you speaking of the tape between the hand and the blade or on the opposite side?

The Witness: Between the hand and the blade.

Mr. Schroeder: Not necessarily though on the other side of the hand?

(Deposition of Eugene L. Hammond.)

The Witness: No, that could be free as long as the tape has pressure at the point of the blade, and the hand comes down.

Mr. Hofeldt: Off the record.

(Discussion off the record.)

Q. (By Mr. Hofeldt): Throughout this period of 1949, from early 1949 to October, 1949, that you observed these operations in the Chun King plant—by “operations,” I mean taping the cans together in an end-to-end relationship—was there any change in the type of tape that was ordered?

A. Not to my recollection.

Q. Was it part of your duties as a tape salesman to observe the operations that involved your tape? A. Yes, sir.

Q. So you made a point of observing these operations? A. Yes, sir.

Q. In the Chun King plant? A. Yes.

Mr. Hofeldt: I believe that is all.

Mr. Schroeder: I have just a couple more questions.

Redirect Examination

Q. (By Mr. Schroeder): With regard to the taping operation again, do you recall whether the cans at all times remained within the V-shaped trough, or were they sometimes removed from it and the tape applied afterwards?

A. I recall that they were lifted slightly to relieve any scraping along the beading on the bottom of the angle iron.

Q. I see. A. I do recall that.

(Deposition of Eugene L. Hammond.)

Q. They lifted them up?

A. In some cases, they did, yes.

Q. In some cases, they just rolled them in the V-shaped trough?

A. Yes, but it did present the problem of scraping at the time, so I think the operators, as they became more experienced, would raise it slightly to facilitate the operation.

Q. I see, and just apply the tape?

A. Right.

Q. You testified that you are not an officer of Minnesota Mining? A. No, sir.

Q. You wouldn't like to see them lose this lawsuit though, would you?

A. Well, I don't know that they are involved.

Mr. Schroeder: That is all I have.

Recross Examination

Q. (By Mr. Hofeldt): You said that they sometimes raised the cans slightly, but they were still within the legs of the V-shaped trough, were they?

A. One end was. One end would remain, you see, down when they lifted the other side up, and after they had applied — Let's assume that they have about half of the circumference or less, with the tape adhering to both beads, both tins, and then they would lift slightly and spin the tin. Now, I do recall that taking place.

Q. Was that a two-handed operation to raise the tins?

(Deposition of Eugene L. Hammond.)

A. One to lift the tins and the other to apply the tape.

Q. I am speaking now of when you said you raised them slightly in the V-shaped trough.

A. Yes, sir.

Q. What do you mean by "apply the tape"? You said "one hand to apply the tape."

A. As I recall the operation, in lifting the one tin after they had applied pressure to the tape, to the beading, it would then stick enough so that they could finish the revolution of putting the tape around with their fingers. By lifting the tin, they would facilitate the spinning or the turning of the two tins then, and would relieve any scraping that might take place of the beading, the tape against the angle iron, the V.

Q. If they cut off a piece of tape from the roll before applying, would the sticky side of the tape be down? A. Yes, sir.

Q. Necessarily? A. Yes, sir.

Q. That would have allowed the free end or the cut end to drag? A. It could.

Q. Do you know what the purpose of the V-shaped trough was?

A. Merely to align the edges of the beading of both tins, I think. I don't know.

Q. Well, in the observations that you made of this operation, is that what it was used for?

A. Yes.

Mr. Hofeldt: I guess that is all.

Mr. Schroeder: That is all I have.

(The reading and signing of the deposition by the witness was waived.)

(Whereupon, at 11:30 o'clock, a.m., the deposition was duly concluded.)

[Endorsed]: Filed November 21, 1955.

Mr. Harris: I wish next to offer in evidence as the defendant's exhibit next in order the depositions of Evert N. Forsberg, Harvey C. Ramsey, Horace James Lee, and James Edward Bingham, taken at Duluth, Minnesota, on October 11 and 12, 1955. [365]

Mr. Lewis E. Lyon: Your Honor, there is only one thing, so far as the testimony of Mr. Bingham is concerned, Mr. Bingham was in court, and he has testified. He is not an officer of the plaintiff corporation.

Mr. Harris: That is correct, your Honor, and I will be glad to go over the deposition with him, but to save the time of the court I think we can simply agree that the court may——

The Court: In the case of witnesses present, I would rather hear the oral testimony rather than read their deposition. [366]

* * * * *

Mr. Harris: Then, if the court please, may the depositions of Forsberg, Ramsey and Lee, which I have offered, be admitted into evidence? They are all residents of Duluth, Minnesota, and are not here in court.

The Court: All right. They may be received.

* * * * *

The Clerk: The deposition of Evert N. Forsberg is marked, for identification, as Defendant's Exhibit AA, and is admitted into evidence.

The deposition of Horace James Lee is identified as Defendant's Exhibit AB, and the deposition of Harvey C. Ramsey is identified as Defendant's Exhibit AC. All of these, Exhibits AA, AB, and AC, are admitted in evidence. [367]

(The deposition of Evert N. Forsberg was received in evidence and marked Defendant's Exhibit AA; the deposition of Horace James Lee was received in evidence and marked Defendant's Exhibit AB; and the deposition of Harvey C. Ramsey was received in evidence and marked Defendant's Exhibit AC.)

DEFENDANT'S EXHIBITS AA-AB-AC

[Title of District Court and Cause.]

DEPOSITIONS OF EVERT N. FORSBERG, HARVEY C. RAMSEY, HORACE JAMES LEE

Taken at the instance of the defendants in the above entitled actions, under the Rules of Civil Procedure for the District Courts of the United States, pursuant to notice annexed in each of said actions, and to stipulation hereinafter noted, before Lee A. LaBaw, a notary public in and for the County of St. Louis, State of Minnesota, at the offices of Nye, Montague, Sullivan, Atmore & McMillan, 1200 Alworth Building, Duluth 2, Minne-

sota, on the 11th day of October 1955, commencing at 10:00 o'clock a.m.

Williamson, Schroeder, Adams & Meyers, 950 Pillsbury Building, Minneapolis 2, Minnesota, by Mr. Everett J. Schroeder, appeared on behalf of the plaintiffs in each of said actions; Harris, Kiech, Foster & Harris, 321 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California, by Mr. John W. Hofeldt, appeared on behalf of the defendant Oriental Foods, Inc.; and Haight, Goldstein & Haight, 209 South LaSalle Street, Chicago 4, Illinois, by Mr. John W. Hofeldt, appeared on behalf of the defendants Hung K. Tom and Ann Wong Tom, copartners doing business as Min Sun Trading Company, and Min Sun Trading Co., a corporation.

* * * * *

EVERT N. FORSBERG

having been duly sworn by the notary, testified as follows:

Cross Examination

Q. (By Mr. Hofeldt): Would you state your full name? A. Evert N. Forsberg.

Q. How old are you, Mr. Forsberg?

A. Forty-one.

Q. Where do you live?

A. 1907 Kent Road.

Q. Where are you employed?

A. Chun King Sales, Inc.

Q. That is one of the plaintiffs in both of these actions? A. Yes, sir.

(Deposition of Evert N. Forsberg.)

Q. What are your duties at the present time with Chun King Sales?

A. I am in charge of traffic.

Q. And, briefly, what does that entail?

A. It entails the receiving and the shipping of merchandise.

Q. Now, the receiving end, does that mean all the products that Chun King Sales would receive for use of conducting its business? A. Yes.

Q. All the equipment, supplies, et cetera?

A. Yes.

* * * * *

Q. Is it your function to take over when the sales are made to ship to the various customers?

A. Yes.

Q. Did you have any duties previous to the present with Chun King, other than those you have mentioned heretofore?

A. The traffic department entails close association with all departments.

Q. How long have you been with Chun King Sales? A. Since 1947.

Q. What were your first duties with Chun King Sales? A. With traffic.

Q. And your duties have not changed over the years at any time, have they?

A. No, that is my fundamental job, is traffic.

* * * * *

Mr. Hofeldt: Incidentally, Mr. Reporter, I would like it noted on the record that Mr. Lee, Mr.

(Deposition of Evert N. Forsberg.)

Paulucci, and Mr. Ramsey are present at the taking of this deposition.

* * * * *

Q. Just where in the process of the shipping of products do you take over, in what condition, in other words, are those products when you take over?

A. When they are in completed cases.

Q. When they have been completely cased. If there are any rejects of products, do they come back to you?

A. Yes, they would come through me.

Q. To the best of your recollection, when was the first time that Chun King Sales packaged products in cans and sold them when the cans were affixed to each other? A. I would say 1948.

Q. And in 1948 how were those cans affixed to each other?

A. They were put together with tape.

Q. Were they taped end to end as opposed to side to side? A. Yes.

Q. You understand what I mean, "end," the end of the can, I am referring to the part it sets on normally or the opposite part, and when I refer to the sides, that is the round part of the can. Were you familiar with the operation of taping those cans together back in that year? A. No.

* * * * *

Q. Did you ever have occasion to go around the plant? A. Yes.

(Deposition of Evert N. Forsberg.)

Q. Did you do that daily, hourly, or how frequently did you go around?

A. Oh, I had occasion to go out at least once a day.

Q. Did you have occasion to observe this operation of putting the cans or taping the cans end to end?

A. Oh, I have seen them do it.

Q. Back in 1948 when you observed this operation was it done on a table or on the floor or what?

Mr. Schroeder: He didn't say he observed it in '48; he only said that he knew they sold such cans in '48.

Mr. Hofeldt: Then strike that question and let me ask this one:

Q. In 1948 did you observe this operation?

A. I am not sure of the dates.

Q. Well, when is the earliest time that you recall seeing this operation of taping cans together end to end?

A. About 1950.

Q. Was this method of packaging Oriental Foods wherein cans of separate items were taped end to end, was that a new method as far as you were concerned, a new method of packaging?

A. As far as I was concerned, yes.

Q. Did it make any effect upon you, were you interested in that particular method?

A. Yes, I was interested.

Q. Did your volume of shipments increase at the time you first knew of this method of packaging?

A. Yes, I would say they did.

(Deposition of Evert N. Forsberg.)

Q. Well, can you answer, then, was the increase in volume of shipping a startling one?

A. The increase of all of Chun King's business has been startling.

Q. Well, let's take just that, the packs that were put in cans and sealed end to end by tape.

A. Yes, I would say it was, and all of the rest of our items followed in line, also.

* * * * *

Q. Now, in 1950 you say, to the best of your recollection, you first observed this method of packaging wherein the cans were affixed end to end by tape, is that correct? A. Yes.

Q. Did you have occasion to observe how the taping was done?

A. I have never observed in detail.

Q. Well, will you answer my question: You had occasion to observe how it was done, generally?

A. Yes.

Q. Do you remember the equipment used back in 1950? A. No, I don't.

Q. Do you recall whether a trough of any kind was used? A. I don't recall.

Q. Was this a machine process of taping the cans, or was it a manual process?

A. It was a manual process.

Q. Were women or men doing this?

A. Women.

* * * * *

Q. Did you have occasion in the shipping of these products to ever see how they were taped

(Deposition of Evert N. Forsberg.)

together, what type of tape, rather, was used?

A. Why, I have seen them taped together.

Mr. Schroeder: Was that your problem, the manner in which they——

A. No, that was not my problem; my problem was the shipping and receiving.

* * * * *

Q. Did you have any rejects of cans that were taped together in end-to-end relationship? Now, start in 19—well, the first time you can recall?

A. I don't recall any actual rejects; there may have been; they may have just sent in labels to substantiate a claim as such.

Q. Had you been told, prior to the time that Mr. Paulucci told you of the new method, that the old method was not satisfactory?

A. I knew that from my own experience on that in talking to our own men in the field, and our brokers.

Q. What did they tell you?

A. That they observed, on various shelves, that they were coming apart.

Q. Did you get any rejects from those people?

A. No; as I recall it, we attempted as much as possible, to retape them.

Q. Where?

A. Well, in most instances, I imagine the brokers would do it themselves.

Q. Did any of these brokers tell you how they were taping them together when they were retaping them?

(Deposition of Evert N. Forsberg.)

A. No, except I imagine they tried to duplicate what we were doing.

Q. Did they know what you were doing?

A. They knew that we were affixing the two cans with tape.

Q. Is that all they knew?

A. To my knowledge, that is all they knew.

Q. You didn't tell them how to retape them, did you? A. No.

Q. So they were left to their own devices?

A. Yes.

Q. Did you ever see one of these brokers retape a can? A. No.

Q. You said that some of the brokers complained to you, is that correct? A. That is right.

Q. Do you recall the names of any of them that did? A. I don't recall any names.

* * * * *

Q. Did you notice any sharp increase in the amount of tape that was coming through your hands? A. Yes.

Q. And when was that?

A. I don't recall the exact dates.

Q. About when?

A. I would say about 1949 or 1950.

Q. Was it a sharp increase in the amount of tape?

A. When you say "sharp" will you elaborate more on that.

Q. All right. Prior to the time that you can recall that Chun King was sealing cans in end-to-

(Deposition of Evert N. Forsberg.)

end relationship, using tape, did you ever, prior to that time, receive any tape for industrial use from anybody? A. None that I recall.

Q. What is the first order that you recall?

A. I do not recall any specific order.

Q. Well, as I understand it, prior to a certain date you never received any tape for industrial use, is that correct? A. To my knowledge.

* * * * *

Q. Now, in the shipping of your products, did you keep separate records for the products that were shipped with the cans joined together by tape as opposed to the products that were not?

A. Not separately, no.

Q. They were just all run together?

A. Are you referring to invoicing or——

Q. Well, let's start with invoicing.

A. No, they were not kept separate on the invoice.

Q. They were kept separate some place?

A. Well, no place that I recall.

Q. You have no records for that, to show the separation?

Mr. Schroeder: If you don't know of any, just say so.

* * * * *

Q. Do you know when the new method, as related to you by Mr. Paulucci, went into effect?

A. I would say only, to the best of my knowledge, when we moved into our new plant.

Q. Had you been shipping products with the

(Deposition of Evert N. Forsberg.)

cans taped end to end continuously up to that point? A. Yes, I would say so.

Q. In other words, there was no interruption when you changed over from one method of taping to another? A. No, I don't believe so.

Q. About the same volume prior to this date and after?

A. The volume of Chun King has increased steadily since its inception.

Q. Well, ignoring that factor, a natural increase in business, was there anything out of the norm from the time just before August of 1951 to after that time?

A. Well, that is a hard question to answer, because our increases have been—to make a comparison in there.

Q. But you did ship continuously products in cans joined end to end by tape? A. Yes.

* * * * *

Q. Did you receive any rejects from your customers after August 1951?

A. None that I recall.

Q. They just stopped at that point?

A. When you are saying about "rejects," is that—for what reason?

Q. All right; what reasons did you have for having rejects?

A. Well, you will have a reject for dented cans that could happen in transit or any business firm is going to have a certain percentage of that.

Q. All right. Just direct your attention to re-

(Deposition of Evert N. Forsberg.)

jects because of something to do with the taping of cans end to end; you had rejects prior to August 1951, for that reason?

A. Well, we had complaints, as I stated before, from our own men and from our brokers.

Q. But none came back?

A. There may have been, but I do not recall any.

Mr. Schroeder: What would you do about the complaints?

A. We would send the tape either to our own men or to the broker.

Q. (By Mr. Hofeldt): Would you send that tape?

A. I would instruct our sample department to do that.

Q. What kind of tape did you tell them to send?

A. The same as what they were using in the plant.

Q. Did you follow through to make sure that they were following your instructions?

A. Well, I would follow through to the extent that I knew it was done.

Q. What instructions did you give these men, if any, on taping?

A. I didn't give them any instructions.

Q. You just said, "Go out and tape."

A. They were the ones that requested it.

Q. The customers now, the brokers, is that right? A. The brokers.

Q. That is what you referred to as "they" in the preceding answer? A. That is right.

(Deposition of Evert N. Forsberg.)

Q. And, generally, what were those requests?

A. Well, they would notice themselves that the cans were parting on the shelves and a product will not sell that is in an unsalable condition and they would want to put it in a salable condition.

Q. Did you give your men that went out—and when I say “you” I am talking about Chun King Sales—any equipment other than tape?

A. No.

Q. In other words, they were supposed to satisfy the customers’ complaints with the tape alone?

A. Yes.

* * * * *

Q. Now, going back to the rejects again, and I want again to have you confine your attention to complaints that you received about your products in which cans were joined end to end with tape, what was a complaint, a type of complaint?

A. Well, they would complain that the cans were apart on the shelves.

Q. Is that the only complaint you received?

A. With reference to your preceding question?

Q. Yes. A. Yes.

Q. The only complaint you ever had in that specific field was that the cans came apart?

A. That is right.

Q. Did anybody specify any reason that they were coming apart? A. Not that I know of.

Mr. Schroeder: Excuse me. Did you intend to limit your answer before to on the shelves? I don’t

(Deposition of Evert N. Forsberg.)

think you intended to limit your question to that, did you John?

Mr. Hofeldt: No.

Mr. Schroeder: You mean coming apart any place. I think his answer was intended that way, but the record would indicate——

Mr. Hofeldt: All right, let's make that clear, then.

Q. Were there any complaints received other than the cans coming apart, wherever they came apart, in cases, when they were on the shelf, when they were handled?

A. The only complaints I recall is when they have been handled.

* * * * *

The examination, reading and signing of the deposition were waived by the witness and by counsel for the respective parties.

Mr. Hofeldt: It is stipulated that Evert Forsberg is an officer of the plaintiff Chun King Sales, Inc., and is vice president in charge of traffic for Chun King Sales.

HARVEY C. RAMSEY

having been duly sworn by the notary, testified as follows:

Cross Examination

Q. (By Mr. Hofeldt): Would you state your name for the record.

A. Harvey C. Ramsey.

Q. Where do you live, Mr. Ramsey?

(Deposition of Harvey C. Ramsey.)

A. Duluth, Minnesota.

Q. And street? A. 100 Elizabeth Street.

Q. How old are you? A. Forty-eight.

Q. Forty-eight. What is your job?

A. Vice president in charge of sales.

Q. You are an officer of the company?

A. That is right.

Q. Of Chun King Sales, Inc?

A. That is right.

Q. Do you hold any other post with that company? A. No, I do not.

Q. Are you a director of that company?

A. No, I am not.

Q. How long have you been with Chun King Sales? A. In this capacity?

Q. In your present capacity, yes.

A. I was appointed in June of this year.

Q. You were appointed in June of this year; and prior to that time?

A. I was general sales manager in 1954 and 1955.

Q. And prior to that time?

A. 1953, November 1953 to June 1954, in charge of sales Chun King Frozen Foods Corporation.

Q. Would you go just a little easier on that one?

A. In charge of sales, Chun King Frozen Foods Corporation.

Q. Is that related to Chun King Sales?

A. In a way, yes. It is a subsidiary company. Am I correct there?

Mr. Schroeder: I don't know, frankly.

(Deposition of Harvey C. Ramsey.)

Mr. Hofeldt: Do you want to just make a statement, Mr. Paulucci, of what the——

Mr. Paulucci: They are separate corporations.

Q. (By Mr. Hofeldt): And prior to 1953, November 1953?

A. I was Southern Division representative for Chun King Sales, Inc., from 1951 to 1953.

Q. And prior to that time?

A. I was not associated with Chun King.

Q. What was your association prior to 1951?

A. I was associated with a food broker.

Q. And what was the name of that broker?

A. J. A. Elliott Company.

Q. At that time was Elliott a broker for Chun King Sales? A. Yes.

Q. From 1951 to 1953 when you were Southern District sales representative, where were you located? A. Kansas City, Missouri.

Q. Throughout that period? A. Yes.

Q. And, roughly, what did you territory cover?

A. About seven states.

Q. Around Missouri? A. Yes.

Q. What were your duties as sales representative?

A. As sales representative my duties were to work with brokers in my division, calling on the wholesale and retail trade.

Q. Did you have anyone working under you?

A. No, sir.

Q. You were the entire force?

A. In that particular area, yes.

(Deposition of Harvey C. Ramsey.)

Q. In 1951 were you or your company selling cans of food wherein the cans were taped end to end? A. Yes, sir.

Q. Did you ever have occasion to observe the operation of taping them end to end?

A. No, sir.

Q. Were you ever in the plant of Chun King Sales during that time?

A. During what time?

Q. 1951 and 1953? A. Yes, sir.

Q. Did you observe any operations at that time?

A. Not specifically.

Q. Did you, generally, see what was going on there as far as taping cans together?

A. Generally.

Q. And did you notice the equipment that was being used? A. I did not.

Q. Did you notice if there was a V trough there of any kind? A. No, I did not.

Q. Did you notice if the work was being done at a table?

A. No, I do not recall exactly where or how it was done.

Q. During the time you were Southern District sales representative for Chun King Sales did you receive any rejects from customers, or complaints from customers, with relation to the cans of food taped end to end? A. Yes, quite a few.

Q. And, generally, what were those complaints?

A. The cans would come apart where the taping was.

(Deposition of Harvey C. Ramsey.)

Q. Was there any other complaint?

A. Not in that respect.

Q. Anything respecting appearance?

A. Well, where the cans broke apart, naturally it did a little job of disfiguring the labels.

Q. Can you describe to me the appearance of the tape on the cans at or about 1951?

A. No, not exactly.

Q. Did the edges of the tape have any special appearance to you? A. No; I don't recall.

Q. Looked just like someone had taped cans end to end, is that right? A. That is right.

Q. Did you ever have any complaints upon the appearance of the tape? A. Not that I recall.

Q. When you received these complaints—I am talking now of 1951—when you received those complaints what did you do?

A. We had tape that we had asked the company for and either myself or the clerks in the stores tried to tape them together the best we could.

Q. Did you furnish tape to the clerks in the store for that purpose?

A. If they would use it.

Q. Did you ever know of anybody who would purchase their own tape? A. No.

Q. Generally, what kind of tape were you furnished? A. I don't remember.

Q. Well, was it a cloth tape, a cellophane type, paper?

A. I don't recall exactly what tape it was they sent down to us.

(Deposition of Harvey C. Ramsey.)

Q. Was it a shiny tape? A. I don't recall.

Q. Was it colored? A. I am not sure.

Q. It might have been colored?

A. I do not recall.

Q. The products that you were selling at that time with the cans taped together, did they have a colored tape on them? A. I don't recall.

Q. Did you try to match whatever color it might have been with the tape you were repairing with? A. Not that I remember.

Q. Did you have any specific instructions from the home office of Chun King Sales on how to tape them together? A. No.

Q. Did you put the tape around the bead of the can in retaping?

A. What do you mean by the "bead"?

Q. Well, as I understand the "bead," the bead is the portion of the bottom of the can which contacts the side walls of the can and sticks out a little ways beyond the side wall of the can; is that what you understand it to be? A. Yes.

Q. Did you apply that tape when you were repairing these cans around the bead of the can?

A. Around the bead of the can?

Q. Around the bead of the cans where the top bead of one can and the bottom of the other can were? A. We attempted to.

Q. How did you do that? A. By hand.

Q. And could you describe your hand operation for me? A. Lousy.

Q. Well, now, that is——

(Deposition of Harvey C. Ramsey.)

Mr. Schroeder: He doesn't mean the result; he means how did you go about it? He thought you meant the results.

Q. (By Mr. Hofeldt): No; I mean the mechanics that you employed.

A. Well, I don't recall exactly how we did go about it.

Q. Well, did you cut a piece of tape off the roll before you applied it? A. Not necessarily.

Q. Did you ever put the free end of the tape on the can and then unwind from the roll as you were winding around the remaining portion of the can head?

A. I don't recall exactly what procedure was used.

* * * * *

Q. (By Mr. Hofeldt): Did you ever ask any instructions from the home office on how to tape cans? A. I don't recall.

Q. Did you ever receive any instructions from the home office? A. You asked that before.

Q. Well, did you answer it?

Mr. Schroeder: You can answer.

A. No.

* * * * *

Q. Now, directing your attention to the time when you were Southern District sales representative, do you recall any specific customers complaining then about these cans of food taped end to end with tape? A. No.

Q. You recall no specific customer?

(Deposition of Harvey C. Ramsey.)

A. No, sir.

* * * * *

Q. Have you ever received any complaints from your customers, of the cans that are taped end to end coming apart since 1954? A. Very few.

Q. But you have received them?

A. Very few.

* * * * *

HORACE JAMES LEE

having been duly sworn by the notary, testified as follows:

Cross Examination

Q. (By Mr. Hofeldt): Would you state your full name, please? A. Horace James Lee.

Q. Where do you live, Mr. Lee?

A. 2111 East Third Street, Duluth, Minnesota.

Q. How old are you, Mr. Lee?

A. Fifty-eight.

Q. What is your job at present?

A. Vice-president in charge of public relations.

Q. For what company?

A. Chun King Sales, Inc.

Q. Generally, what are your duties?

A. Anything involving public relations. It is a very broad subject.

Q. Advertising?

A. No; more the publicity than the advertising.

Q. I am afraid I don't get the distinction there; could you explain that a little bit?

A. Well, advertising is paid space, and others

(Deposition of Horace James Lee.)

out there [61] have to do with the arranging and the decisions in connection with advertising, whereas public relations work involves working with food editors of magazines, newspapers, TV and Radio stations.

Q. Who is in charge of your advertising?

A. Mr. Paulucci.

Q. How long have you been vice-president in charge of public relations?

A. Since June 1955.

Q. With whom were you connected prior to that time? A. With Chun King Sales, Inc.

Q. In what position?

A. Vice-president in charge of sales.

Q. When did your duties as vice-president in charge of sales begin?

A. Approximately a year prior.

Q. And prior to that, what was your position?

A. General sales manager.

Q. How long did you hold that post?

A. I would say for about four years prior to that time.

Q. Since about 1949 or '50?

A. Well, I started out in August 1948, as a sales representative, and I think for a matter of two years or more my duties were those of a sales representative, a one-man sales force. [62]

Q. Did you work out of the Home Office?

A. Yes, I did.

Q. Did you maintain an office there as sales representative?

(Deposition of Horace James Lee.)

A. During that time I was traveling, as well as subsequently, about, I would say, practically all the time except to come in for conferences with Mr. Paulucci relating to sales.

Q. You said that you were the sole salesman at that time? A. That is right.

Q. That is from August 1948 to about August 1950, is that right?

A. As near as I can remember. [63]

* * * * *

Q. When is the first time you saw any products in cans joined end to end, taped together?

A. I can't say exactly, but my impression is that it was either late in 1948 or early in 1949. [64]

Q. Did you sell a lot of those packages or containers so joined in those years?

A. Not at the outset. It started slowly and built itself up.

Q. Was it larger in 1949 than it had been in 1948?

A. Are you speaking of the sales of these items that are banded together?

Q. Correct.

A. The sales in 1949 were definitely larger than they were in '48, if there were sales in '48; I am not too sure that we had that banded deal.

Q. Well, they did definitely increase from the time you first started them?

A. Yes, they did.

Q. Did they have a steady growth in sales?

A. Yes. [65] * * * * *

(Deposition of Horace James Lee.)

Q. Now, in 1950 were the products in cans joined end to end by tape a large amount of your sales?

A. I would say that they were a considerable part of our sales, yes.

Q. Could you tell me about what the proportion was?

A. No, because I would be guessing if I attempted to do so.

Q. But they were large in volume?

A. They were a sizable part of our sales. [75]

* * * * *

Q. (By Mr. Hofeldt): Let's go back to 1948 to 1950; did you sell more than one case of products with the cans joined end to end by tape?

A. Definitely.

Q. Did you sell more than a hundred?

A. Sure.

Q. Did you sell more than a thousand?

A. I can imagine that we did.

Q. Did you sell more than ten thousand?

A. I wouldn't know as to that.

Q. But you are sure you sold at least a thousand cases of your products in cans, with the cans joined end-to-end relationship by the use of a sticky tape in the years 1948 through 1950?

A. I am reasonably sure of that.

Q. But you don't know how many more?

A. No, I do not.

Q. Was it more? [76]

A. I have a feeling that it was.

(Deposition of Horace James Lee.)

Q. Does your feeling run to the extent of considerably more?

Mr. Schroeder: Do you know, Jim, or are you just guessing?

A. Yes, I would say my impression is that it was considerably more.

Mr. Schroeder: Do you have any figures on it at hand?

A. No, I don't.

Q. (By Mr. Hofeldt): All right. Now, during the period of 1950 to 1951 did you have a volume of sales that had increased over the 1948 to the 1950 period?

A. Are you putting two years against one, or——

Q. Well, I am putting 1948 to 1950 in one; that is what you have been answering.

A. Yes.

Q. Now, I am putting the year 1950 to January 1, 1951, approximately; I am wanting to know whether your sales of these products in cans, with the cans joined end to end by means of a tape, did they have an increase over the preceding average year?

A. I would say that we have shown a consistent increase year after year. [77]

* * * * *

Q. Had any customers or brokers complained directly to you that they had purchased a competitive product thinking it was that of Chun King Sales?

(Deposition of Horace James Lee.)

A. Are you speaking about—brokers do not buy for their own account; are you speaking about wholesalers?

Q. Yes. A. No. [89]

Q. Did they report to you that any of their customers had purchased a competitive product or products thinking they were those of Chun King Sales?

A. I do not recall any specific instances. [90]

* * * * *

[Endorsed]: Filed Oct. 27, 1955.

Mr. Harris: Next, if the court please, I offer into evidence the deposition of the plaintiff, Jeno F. Paulucci, taken on May 23, 1955, as a defendant's exhibit next in order.

The Clerk: That will be AD. * * * * *

The Clerk: Marked as Defendant's Exhibit AD, and [368] admitted in evidence, the deposition of the plaintiff, Jeno F. Paulucci.

(The deposition referred to was marked Defendant's Exhibit AD, and received in evidence.) [369]

DEFENDANT'S EXHIBIT AD

[Title of District Court and Cause.]

DEPOSITION OF JENO F. PAULUCCI

taken on behalf of defendant at 321 Subway Terminal Building, Los Angeles, California, commencing at 10:00 o'clock a.m., Monday, May 23, 1955, before

W. E. McClure, a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed Notice of Deposition and Production of Documents.

Appearances of Counsel: For Plaintiffs: Williamson, Schroeder, Adams & Meyers, Esqs. and Lyon & Lyon, Esqs., by Lewis E. Lyon, Esq. For Defendant: Harris, Kiech, Foster & Harris, Esqs., by Ford Harris, Jr., Esq. and Walton E. Tinsley, Esq. [1]

JENO F. PAULUCCI

having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Harris): You are Jenó F. Paulucci?
A. Yes, sir.

Q. You are one of the plaintiffs in this action, are you not?
A. Yes, sir.

Q. What is your residence, Mr. Paulucci?

A. 6 Minneapolis Avenue, Duluth, Minnesota.

Q. You are president, are you not, of the other plaintiff in the case, Chun King Sales, Inc.?

A. Yes, sir.

Q. Mr. Paulucci, you personally executed the complaint in this case on behalf of yourself as an individual and on behalf of the plaintiff, Chun King Sales, Inc., as its president?

Mr. Lyon: I think the paper speaks for itself. It is under oath, is it not?

Q. (By Mr. Harris): Is that correct, Mr. Paulucci?

Mr. Lyon: Answer.

(Deposition of Jeno F. Paulucci.)

The Witness: Yes, sir.

Q. (By Mr. Harris): You are the applicant, Jeno F. [2] Paulucci, of the patent in suit, No. 2,679,281, are you not? A. Yes, sir.

Q. You are familiar with the contents of that patent, are you not? A. Yes, sir.

Q. When was the plaintiff Chun King Sales, Inc., incorporated? A. May of 1947.

Q. You are a stockholder of that corporation, are you not? A. Yes, sir.

Q. Approximately what percentage of the stock do you own in that corporation?

A. 100 per cent.

Q. In general what is the business of the plaintiff corporation?

A. Packers and distributors of Oriental-American foods. [3]

* * * * *

Q. When did you either make or have made for you first any machine as illustrated in your patent in suit, or similar thereto?

Mr. Lyon: The question is so indefinite as not to be susceptible of an answer as to when he first made a machine. I will permit him to answer as to when he first made a machine as to placing together the cans, which is a question which he can answer.

Q. (By Mr. Harris): If such machine was used in binding cans of the type illustrated in Exhibits 1 and 2 here in the room, when was that machine first made?

A. May I have the statement of counsel?

(Deposition of Jeno F. Paulucci.)

(Record read as requested.)

The Witness: It was after we moved into the new plant.

Q. (By Mr. Harris): When was that?

A. In August of 1951. [30]

Q. As of June 7, 1949, you were using resilient sticky tape in your business, were you not?

A. Yes, sir.

Q. And you were using such tape to fasten together two or more containers? A. Yes, sir.

Q. And you were selling those products, were you not? A. Yes, sir.

Q. From whom were you buying that tape that you were using at that time?

A. Minnesota Mining. There might have been others, but Minnesota Mining to a greater degree, if not all.

Q. This company, Mystik Adhesive Products, on the letterhead of this last letter Mr. Lyon has produced, does that have anything to do with Minnesota Mining & Manufacturing Company?

A. I did not look at the letterhead.

Mr. Lyon: Neither did I.

The Witness: No, this is another tape supplier. This is another tape supplier.

Q. (By Mr. Harris): Did you buy tape from them about that date? A. I don't know. [43]

Q. At that time, which is about the date of this letter, June 7, 1949, how were you using sticky tape of that type to bind together two or more containers or cans?

(Deposition of Jeno F. Paulucci.)

A. Would you explain how—what you mean by how we were using it?

Q. You bought the tape and you say you were using it to hold together two or more cans, and I am asking you how you used it to do that. Just tell us how you used the tape.

A. By taping two cans together, by putting the tape around the—fastened to the two beads.

Q. And in doing that you took the two separate cans and put them end-to-end in alignment, did you? A. Yes.

Q. And then you stretched the tape over the bead of the cans and fastened the tape to the cans, did you? A. No, sir.

Q. How did you do it?

A. I explained it.

Q. Please give us a little fuller explanation as to just what steps you went through to do that.

A. We rolled—we put the tapes on the two cans and rolled the two cans into the tape, and cut the tape.

Q. The tape, of course, was in a dispenser of some kind, was it? A. Yes. [44]

Q. A roll of tape in a dispenser; is that right?

A. Yes. [45]

* * * * *

Q. But, in any event, when you so used the tape the tape was in a dispenser, was it not?

A. Yes.

Q. And then what were the steps, Mr. Paulucci? The operator pulled the tape off the roll of tape

(Deposition of Jeno F. Paulucci.)

and fixed the end of it to the cans aligned and held together? Is that the first step in doing it?

A. More or less, yes.

Q. How were the cans held, were they just loose on a table or were they in a V-shaped trough, or how were they held?

A. I don't remember exactly, but they were held in such a way that we could hold them together.

Q. You don't remember whether you were using a V-shaped trough at that time?

A. No, sir.

Q. Then after the end of the tape was affixed to the can then, as I understand it, you rolled the cans, holding the tape tight until the tape was stretched all the way around the can and then it was cut off; is that right?

A. No, sir. [46]

* * * * *

Q. (By Mr. Harris): When you say you rolled the cans into the tape, you meant what? How was that done?

A. By your turning the tapes—the cans so that the tape went around the diameter of the can. [47]

Q. And the tape was held tight while that was being done, was it?

A. No, sir.

Q. How was it held?

A. The tape was not held after it was put, as I mentioned in my answer, on the can. You described it before. You said you pulled the tape from the roll and then you put the edge of the tape on the cans, and then I elaborated further that we then rolled the cans into the tape, which was loose.

(Deposition of Jeno F. Paulucci.)

Q. The tape was loose at that time?

A. Yes, sir.

Q. You did not hold the tape tight?

A. No, sir.

Q. Was that a resilient tape that you were using at that time?

A. The same kind of tape that we are using now.

Q. And cans so put together were sold by you about the same time, were they not?

A. Yes, sir.

Q. Simply ordinary commercial sales?

A. Yes, sir. [48]

* * * * *

Q. (By Mr. Harris): In this method of putting cans together that you have described, how did you hold the cans? A. By the two hands.

Q. And on what were the cans resting?

A. A bench, a table.

Q. Those operations were performed by your employees in your plant, were they? A. Yes.

* * * * *

Q. When cans were put together with sticky tape at that time how was the loose end of the tape held? A. Which loose end?

Mr. Lyon: That is what I want to know.

Q. (By Mr. Harris): You said one end was affixed to the cans. There is another end of the tape. How was that held?

A. It was held by the dispenser until it was ready to be cut.

(Deposition of Jen0 F. Paulucci.)

Q. At what stage was it cut? [50]

A. When the cans were approximately rolled completely into the tape.

Q. In other words, after you had a layer of tape all around the can then you cut the tape, the operator cut the tape, did he? A. That is right.

Q. Then what did he do, just press the loose end down onto the can?

A. Just touch it down, yes.

Q. When was it you first used a machine to accomplish that purpose, that is, fastening two cans together with a sticky tape?

A. What kind of a machine are you referring to?

Q. Any kind of a machine.

A. Well, in a previous question you asked me about a dispenser. Would you refer to that as a machine?

Q. Other than the dispenser did you have any other jigs or fixtures of any kind or tooling of any kind you used to perform this operation?

A. By "used" do you mean continually?

Q. No, I am not referring to continually, Mr. Paulucci. I am referring to this operation in June of 1949, when you were fastening two or more cans together by your use of sticky tape. I am inquiring as to what type of machine you used at that time.

A. We have answered that before. [51]

Q. Simply the dispenser? A. Yes, sir.

Q. And something to hold the cans so that you could rotate them on the bench; is that right?

(Deposition of Jeno F. Paulucci.)

A. More or less, yes.

Q. What did you use to hold them at that time?

A. As I mentioned before, I don't exactly remember, Mr. Harris.

Q. This was your idea, was it not, putting cans together in this way? A. Yes, sir.

Q. And you can't remember how it was being done at that time?

A. That is six years ago, Mr. Harris.

Q. And you now don't remember what you were doing then at that time?

A. That is correct.

Q. How long prior to June of 1949 had you been performing your same operation in packaging cans of this type?

A. Oh, it may have been a month or two. [52]

* * * * *

Q. We are talking about the machine that you had in your plant early in September, 1951, which you were using to tape two or more cans together with. Now, what was in that machine? What did it consist of?

A. A tape dispenser and a trough.

Q. A v-shaped trough? A. Yes.

Q. Spaced from the dispenser?

A. Yes, sir.

Q. How far from the dispenser was the trough spaced? A. I can't tell you exactly.

Q. Well, roughly.

A. Oh, from 8 to 12 inches.

Q. And the trough and the dispenser were

(Deposition of Jen0 F. Paulucci.)

mounted on a [57] baseboard of some kind, were they? A. Mounted on a table.

Q. On a what? A. On a table or a bench.

Q. They were rigidly fastened on a table or a bench, were they? A. Yes, sir.

Q. In spaced relation, as you have described?

A. Approximately.

Q. Was there any cutter of any kind between the dispenser and the V-shaped trough?

A. Not in between the two, no, sir.

Q. Now, as to that particular machine, when was that machine first built?

A. After we moved into the new plant, which was in August of 1951.

Q. Prior to August of 1951 had you ever built a similar machine or had it built for you?

A. Somewhat similar, but not the same.

Q. How many of such similar but not the same machines had you had built prior to August, 1951?

A. By "machine" I take it you now are referring to the dispenser and the trough, Mr. Harris?

Q. That is what you characterized as this machine. Is it a fact that you did have similar machines prior to August of 1951? [58]

A. Experimental models.

Q. How many?

A. Maybe 15 or 20, maybe even more. I don't know.

Q. How did they differ, Mr. Paulucci, from this particular machine that you were using in August of 1951 at the new plant?

(Deposition of Jen0 F. Paulucci.)

A. It might have been the spacing between the trough and the dispenser. It might have been the elevation of one in relation to the other, and so forth.

Q. You say "it might have been." Do you remember? A. Not exactly, no, sir.

Q. Those were the only differences?

A. I will not restrict it to that, no, sir.

Q. Did any of such machines that you had prior to August of 1951 have a cutter mounted on the machine?

A. All the dispensers, Mr. Harris, had a cutter attached to them.

Q. Even this one you were using in August of 1951 at the new plant? A. Yes, sir.

Q. Where was that cutter?

A. At the end of the dispenser.

Q. It was simply an integral part of the dispenser, was it not? A. That is correct.

Q. And these dispensers were obtained by you on the [59] open market?

A. That is correct.

Q. And as so obtained by you they had the cutter mounted on them? A. Yes.

Q. When did you first have such a machine, Mr. Paulucci?

A. You will have to explain what you are referring to.

Q. I am referring to any of these machines that you said you had prior to August, 1951.

A. We had the dispenser part back in 1949.

(Deposition of Jen0 F. Paulucci.)

Q. You had the trough back in 1949, didn't you?

A. We did not, sir.

Q. In 1949 you were acquainted, were you not, with a man named Eugene Hammond?

A. Yes, sir.

Q. Who was an employee of Minnesota Mining & Manufacturing Company in Duluth, Minnesota?

A. Yes, sir.

Q. He called on you at your plant there a number of times during the year 1949, did he not?

A. Yes, sir.

Q. And during such calls he saw, did he not, your operations in which you were joining together two or more cans by the use of a sticky resilient tape? [60]

A. Yes, sir.

Q. He, in fact, supplied some of these dispensers to you, did he not?

A. That is correct.

Q. Don't you remember, Mr. Paulucci, that prior to October 1, 1949, you had in operation a machine for joining two cans together by a sticky tape, in which you had an angle iron set up to form a v-shaped trough, the angle iron being about 3 to 4 inches on each side?

A. I do not remember that, no, sir.

Q. You don't remember showing that machine to Mr. Hammond?

A. No, sir. I don't remember that, as you have described it.

Q. As early as April, 1951, you were, were you not, using one or the other of these early types of machines to join together two or more cans with

(Deposition of Jeno F. Paulucci.)

sticky tape, which cans were then commercially sold by you?

A. Two cans fastened together? Yes. [61]

* * * * *

Q. Did you at any time during the year 1950 have any discussions with Mr. G. C. Cronin with regard to the matter of joining together two or more cans by the use of sticky tape in any way?

A. Yes. In our orders of tape we, of course, had to talk to him whenever he came in.

Q. When he came in during that period to see you he saw, did he not, the machinery and equipment that you [69] were using commercially to join together cans in that fashion?

A. I do not want to be facetious, but again I say exclusive of the patent?

Q. Using any machinery and equipment that you had in any way that you were using to commercially join together two or more cans with sticky tape, Mr. Cronin saw that equipment in your plant during that time; is that not true?

A. Yes, we allowed him a free audience in our plant, without any restrictions. [70]

* * * * *

Q. (By Mr. Harris): Paragraph X of the Complaint reads as follows, and I quote:

“Plaintiff, Chun King Sales, Inc., in cooperation with said plaintiff, Jeno Paulucci, assembled, shipped, displayed, introduced and sold to the public for the first time, canned goods in combinations of two or more cans rigidly and positively

(Deposition of Jen0 F. Paulucci.)

connected together in an end-to-end relationship and as a single unit."

When was it that Chun King Sales first sold assembled two or more cans?

A. Just taped together, or under the method of the patent?

Mr. Lyon: Listen to the question. Read the question. [75]

(Question read by reporter.)

The Witness: Two cans taped together——

Mr. Lyon: Rigidly and positively.

The Witness: Rigidly and positively as per our patent was when we moved into the new plant in August, 1951.

Q. (By Mr. Harris): Is that the first time you ever rigidly and positively connected together two or more cans in an end-to-end relationship as a single unit? A. Yes, sir.

Q. I do not want you to be misled, Mr. Paulucci. I am not limiting this question, nor is your Complaint limited to the use of the patented process in this provision, and I don't want you to be misled in your answer.

Mr. Lyon: Is there a question in front of the witness?

Q. (By Mr. Harris): Now, with that suggestion, do you still say that you did not so connect cans together prior to August, 1951?

A. We connected cans together with a piece of tape, as outlined to you before, in April or May of 1949.

(Deposition of Jeno F. Paulucci.)

Q. Is that what you are referring to here in this Paragraph X of your Complaint, or are you referring to your earliest use of the patent in suit?

A. Earliest use of the patent in suit.

Q. And that was in August, 1951; is that correct?

A. After we moved into the new plant, yes, sir, which was in August, 1951. [76]

Q. What machine did you use to assemble those first cans that you referred to?

A. You mean the ones in April or May, 1949?

Q. No, I mean the ones in August of 1951. What kind of a machine did you use to assemble those cans?

A. The machine we have previously described, the dispenser with the trough.

Q. And a cutter connected to the dispenser?

A. Yes, sir, that is standard equipment. [77]

* * * * *

Q. However, in those years 1949, 1950 and 1951 you did use the same kind of tape, sticky tape, to join together two or more cans that you later used in practicing the invention of the patent in suit, did you not?

A. Sticky tape, yes.

Q. And for the purpose of joining together two or more cans?

A. Correct.

Q. And that was done commercially by you, was it not? In other words, you sold the products of that use?

A. That is correct. [83]

* * * * *

Q. When did you first buy this sticky tape,

(Deposition of Jeno F. Paulucci.)

Cellotape, as you have referred to it, for use in any operations in which you joined together two or more cans, as you have described?

A. For just fastening two cans, it was April or May of 1949.

Q. Did you purchase such tape from anyone other than Minnesota Mining & Manufacturing Company? A. Yes.

Q. From whom?

A. From the El Queeno Cigar Company, and Paper Specialties of Duluth, and I think it was Texel, T-e-x-e-l Corporation.

Mr. Lyon: Those are in 1949? [84]

The Witness: I don't know. These were for 1949, 1950 and 1951.

Mr. Lyon: He only asked as to 1949.

The Witness: Cross that "Texel," because I don't think they were at that time.

Q. (By Mr. Harris): In those years 1949, 1950 and 1951? A. Yes. [85]

* * * * *

Q. (By Mr. Harris): Referring back to Paragraph (h) of the Notice, do you have any records showing your purchases of tape from Minnesota Mining & Manufacturing Company?

Mr. Lyon: If they are material, there are quite a few of them. There are tape purchases here which we have, yes, plenty of them, if you want to look at them. We are not going to produce them and have them marked.

Mr. Harris: I do not care to have them marked,

(Deposition of Jeno F. Paulucci.)

but I [86] would like to look at them, Mr. Lyon, if I may.

Mr. Lyon: Well, here are some for the year 1951, which you may look at then, if you want to.

Mr. Harris: Yes, thank you.

Mr. Lyon: Do not take them out of the folder.

Mr. Harris: We might as well take a recess while I am looking at these for a few minutes.

Mr. Lyon: Here are 1949, 1950 and 1951 for the tape purchases. We do not know whether they are all of the purchases.

(A short recess was here taken.)

Q. (By Mr. Harris): Mr. Paulucci, in some of these invoices for tape sales to you by the El Queeno Cigar Company, Inc., I notice that the item is "Sell-O-Tape," S-e-l-l-O-T-a-p-e. Is that what you referred to as the "Cellotape"? I show you that one.

A. Yes, that is just the way they spelled it. Normally it is C-e-l-l-o, I imagine.

Q. I just wanted to be sure that we were talking about the same thing. A. That is right.

Q. I have been looking through this file of 1949 invoices to you, and there are a very large number indicating tape sales to you. Are these all of your purchases of tape during the year 1949?

A. To the best of our knowledge, yes, sir. [87]

Q. On these invoices to you from Minnesota Mining & Manufacturing Company or the Duluth Paper & Specialties Company, I notice a reference

(Deposition of Jeno F. Paulucci.)

number "600." Apparently that is the identifying number of that tape. Was that tape all "600" tape, do you remember? A. I do not.

Q. In any event, it was all sticky resilient tape, was it not? A. Yes, it was purchased as such.

Q. In other words, all of these purchases of tape in 1949 were purchases of sticky resilient tape?

A. That is correct.

Q. And they were all made by you for the purpose of using such tape in joining together two or more cans; that is correct, is it not?

A. Not in accordance with the patent, but joining two cans together, yes.

Q. I hand you an invoice showing an order number, on April 5, 1949, from Minnesota Mining & Manufacturing Company, and point out to you the item there which reads, "1/2 x 2592 I-n Bxd." What does that mean, "1/2 x 2592 I-n Bxd"?

A. Gosh, I could not tell you.

Q. That means that the tape was half-inch tape, does it not, and was 2,592 inches long?

A. That could be. I am not sure of what it could be, [88] but it could be.

Mr. Lyon: That is 2592 in. boxed?

Q. (By Mr. Harris): I think it is. Here is another similar invoice, and that shows definitely inches on there, and I was wondering about the length of those tapes. Here is another one that shows inch marks. Does that mean to you that was 2592 inches long?

(Deposition of Jen0 F. Paulucci.)

A. To me it doesn't mean anything. I mean it could be, I don't know.

Q. Well——

Mr. Lyon: If the witness does not know you cannot make him know.

Mr. Harris: Well, for the record, these invoices show the following purchases by Chun King Sales, Inc., from Minnesota Mining & Manufacturing Company: 72 rolls on order of March 30, 1949; 144 rolls on order of April 5, 1949; 144 rolls on order of April 9, 1949; 72 rolls on an order dated April 19, 1949.

Mr. Lyon: It says "zero" rolls in quantity.

Mr. Harris: The witness can correct me if I am wrong.

Mr. Lyon: Under the title "Quantity"——

The Witness: I can't tell you. You are reading it, Mr. Harris. I can't infer anything. You are reading, you know, what you see there.

Mr. Harris: These are from your records, and I wanted to have it on the record. They show 144 rolls on an order [89] dated April 29, 1949; 72 rolls on an order dated April 19, 1949; 144 rolls on an order dated June 28, 1949; 144 rolls on an order dated July 18, 1949; 36 rolls on an order dated August 18, 1949; 144 rolls on an order dated August 26, 1949; 108 rolls on an order dated August 18, 1949; 144 rolls on an order dated August 12, 1949, and then an invoice from Duluth Paper & Specialties Company showing a delivery to you of 3 rolls on an order dated August 18, 1949; another one for

(Deposition of Jeno F. Paulucci.)

144 rolls on an order dated August 18, 1949; and another one for 72 rolls on an invoice dated September 6, 1949. [90]

* * * * *

Mr. Harris: And the next one is an invoice from Minnesota Mining & Manufacturing Company to Chun King Sales, Inc., of 144 rolls, No. 600 light green Scotch cellophane tape, "CRA," marked "Paid April 7, 1949."

The next one is an invoice of the same type for 144 rolls of the same kind of tape stamped "Paid April 22, 1949."

The next one is a similar invoice for 72 rolls of similar tape stamped "Paid April 21, 1949."

Mr. Lyon: Of course, the quantity that you are reading in that last invoice is under the word "Unit," and under "Quantity" there is nothing. There is zero quantity. There is a "Unit" there and a No. 72 unit that was sold there, which to me does not mean it was 72 rolls.

Q. (By Mr. Harris): Mr. Paulucci, looking at this invoice in question, that covered the sale of 72 rolls of [92] tape, did it not?

A. It is an ambiguous one. It shows "Quantity" nothing; "Unit, 72 rolls, \$76.57" on it.

Q. You are not going to pay \$76.57 if they did not ship you anything? You would not have paid it?

A. Except this could have been attached to another invoice.

Q. As far as you know, however, this was for 72 rolls at that price; is that right?

(Deposition of Jeno F. Paulucci.)

A. I neither know "yes" nor do I know "no" on it.

Q. On this invoice the price is \$1.54, is it not?

A. That is right.

Q. The same price is on the preceding invoice per roll? A. Yes.

Q. And if you figure 72 rolls at \$1.54 it comes out to \$110.88, does it not?

A. No bill of lading attached to it, like there is on one of the other invoices. There is no packing list attached to it like there is on one of the other invoices, therefore I cannot answer your question "yes" nor "no."

Q. These are your records. I don't know anything about them. I am just trying to inquire about them and find out. A. Yes, sir.

Q. The next invoice of similar type is 144 rolls of [93] similar tape, stamped "Paid May 4, 1949." The next invoice, similar type, is for 72 rolls of similar tape, stamped "Paid May 23, 1949." The next invoice of a similar type is for 144 rolls of similar tape, stamped "Paid June 29, 1949." The next invoice of similar type is for 144 rolls of similar tape, stamped "Paid July 22, 1949."

Then there is a group of invoices and other papers clipped together. Will you explain to me how many rolls of tape you purchased under those invoices?

A. There is one invoice with the packing slip for 36 rolls. There is another invoice with a packing slip for 144 rolls, it seems. There is another

(Deposition of Jeno F. Paulucci.)

invoice with a packing slip for 108 rolls, and then there is another invoice with another packing slip for 144 rolls, so that I don't know if that is a duplication or not.

Q. Then there is a statement to you from the Duluth Paper & Specialties Company dated September 16, 1949, for 144 rolls, marked "Paid October 12, 1949." Then there is a further statement from Duluth Paper & Specialties Company to you for 144 rolls of similar tape marked "Paid November 21, 1949."

I hand you a group of four loose invoices from this file, and ask you if you can tell from those how many, if any, rolls of tape were purchased by you, covered by those invoices?

Mr. Lyon: You mean: And not covered by the ones you [94] just read?

Mr. Harris: Yes.

Mr. Lyon: These are the ones he read.

The Witness: I can't tell you whether there is duplication. You have already listed part of it here. This one here is marked "Nothing," and we have three here that are marked "Paid," but the list is for 3 rolls, and the other 2 is 144 each, but whether or not they are covered by duplication or not, I can't tell. I presume that they are, because that is more or less a bill of lading from them.

Mr. Harris: Then I find here a customer's invoice from El Queeno Cigar Company, Inc., to you, dated November 7, 1949, showing the purchase by you of 108 rolls of tape; another similar invoice

(Deposition of Jeno F. Paulucci.)

showing the purchase by you of 36 rolls of tape, marked "Paid December 17, 1949"; another similar invoice showing the purchase of two rolls of tape marked "Paid January 31, 1950," and another similar invoice showing the purchase by you of 96 rolls of tape, marked "Paid March 2, 1950."

Mr. Lyon: I think that is an error. It is 104. The statement says "8 rolls delivered personally white tape with blue lines" on that invoice.

Mr. Harris: Well, my statement should be corrected from 96 rolls to 104 rolls as to that last invoice.

Mr. Lyon: With the statement which I made.

Q. (By Mr. Harris): I notice on this last invoice, Mr. Paulucci, there is a statement in pencil, "One-cent sale, one-cent sale." What does that refer to?

A. It looks like it was an experimental shipment of printed tape that said "One-cent sale" on it, and "This can meatless," of eight rolls.

Q. That was for use by you in joining together the two cans, in which you were going to sell two for the price of one, plus one cent? A. No.

Q. You during 1949 sold multiple can packs, two or more cans held together by sticky tape, for resale in one-cent sales, did you not?

A. We sold two cans taped together where the can of noodles was sold for one cent.

Q. Where the what?

A. Where the can of noodles, chow mein noodles sold for one cent.

(Deposition of Jeno F. Paulucci.)

Q. All of these tape purchases by you in 1949, the tape that you bought by them was used by you, was it not, in assembling two or more cans together to sell as a package?

A. If the question is "and not in accordance with the patent," the answer is "Yes." [96]

* * * * *

Q. (By Mr. Harris): Referring back to this last invoice to you from El Queeno Cigar Company dated December 29, 1949, I notice again on that one there appears the label " $\frac{3}{4}$ inch x 2592 inch." Does that refresh your recollection that there was 2,592 inches of tape in each one of these rolls?

A. Well, it sounds logical, but I wouldn't be able to say definitely.

Mr. Lyon: In each roll or in the whole order?

The Witness: No, I don't know. It says " $\frac{3}{4}$ of an inch." I imagine that would be the width of one roll. As far as the 2,592 inches, I could not say what that is.

Q. (By Mr. Harris): About how many double cans could you put together with each roll of tape?

A. Being that I do not know the amount of inches to a roll, I cannot answer your question.

Q. You don't have any idea as to how many cans you assembled with a roll of tape? A. No, sir.

Q. Who in your organization would know how many inches of tape there was in a roll during 1949, when you bought this tape?

A. I imagine Minnesota Mining is the one that

(Deposition of Jeno F. Paulucci.)

should tell you. They supplied the tape. They can tell you. [98]

Q. But who in your organization would know?

A. I don't know of anybody that would know.

Mr. Harris: Now, referring to this file of yours labeled "1950," which you have produced in response to the request to produce, I will do the same thing with this file. We will go through and see how much tape you bought during that year.

First, I refer you to a statement from Duluth Paper & Specialties Company, dated February 17, 1950, showing the sale to you of 720 rolls of Type 600, boxed, and 288 rolls of Type 600 light green, boxed, stamped "Paid February 24, 1950"; then a statement from El Queeno Cigar Company, showing the shipment date of August 31, 1950, to you of 216 rolls of red and 72 rolls of green tape, stamped "Paid October 4, 1950"; and a statement to you from Duluth dated August 30, 1950, showing the sale to you of 288 rolls of such tape, marked "Paid September 8, 1950"; a statement dated August 21, 1950, showing the sale to you of 360 rolls of such tape, stamped "Paid August 31, 1950"; and a similar statement dated August 21, 1950, showing the sale to you of 576 rolls of similar tape, stamped "Paid August 31, 1950"; another statement from El Queeno to you dated August 16, 1950, showing the sale to you of 144 rolls of such tape, marked "Paid October 4, 1950"; and another statement by Duluth to you dated August 14, 1950, showing the sale to you of 288 rolls of such tape,

(Deposition of Jen0 F. Paulucci.)

stamped "Paid August 24, 1950"; [99] a further similar statement dated August 1, 1950, showing the sale to you of 216 rolls of such tape and stamped "Paid August 11, 1950"; a further similar statement dated July 28, 1950, showing the sale to you of 144 rolls of such tape, marked "Paid August 7, 1950"; a further statement to you from El Queeno dated June 21, 1950, showing the sale to you of 72 rolls of such tape, stamped "Paid September 27, 1950;" and a further similar statement dated April 4, 1950, showing the sale to you of 60 rolls, 12 rolls, 12 rolls, and 72 rolls.

The Witness: I am not so sure this doesn't cover them all, though. It is the only one that is marked "Paid."

Q. (By Mr. Harris): That is the last one, the 72 rolls? A. Yes.

Mr. Harris: That is stamped "Paid August 8, 1950"; and a further similar statement from El Queeno to you dated March 23, 1950, showing the sale to you of 1152 rolls of such tape stamped "Paid April 17, 1950." [100]

* * * * *

Mr. Harris: This last document the witness has referred to is on the heading of "Goldenberg Brothers." It is dated March 7, 1950.

The Witness: It is also marked "El Queeno."

Q. (By Mr. Harris): That is just in pen, is it not? A. Pardon me, sir?

Q. It is just in pen?

A. It is in pen, but it is marked on the same

(Deposition of Jen0 F. Paulucci.)

invoice, and it is marked on subsequent ones here.

Mr. Harris: It shows the sale to you of 144 rolls of such tape, marked "Paid April 17, 1950." The next one is a similar invoice, which Goldenberg Brothers has crossed out, [102] and El Queeno Cigar Company is written in, and it shows the sale to you of 25 rolls of such tape, being marked "Paid March 22, 1950."

The Witness: And they are on white paper, with the regular El Queeno invoice there on pink paper.

Mr. Harris: Attached to that is a similar invoice, showing a further sale to you on February 28, 1950, of 144 rolls of such tape, marked "Paid March 22, 1950."

* * * * *

Mr. Harris: I am going to find out from Mr. Paulucci how much tape he bought during this year, and if he wants to make it difficult for us that is his privilege. We are going to stay here until we find out.

The next statement in this group is a statement from El Queeno showing the sale of 96 rolls of such tape to the plaintiff, and stamped "Paid November 16, 1950." The next statement is a statement from Duluth Paper & Specialties Company dated September 12, 1950, showing the sale of 504 rolls of such tape to the plaintiff, stamped "Paid September 22, 1950." The next one is a further invoice from El Queeno to the plaintiff, dated September 11, 1950, [103] showing the sale by it to the plaintiff of, first, 480 rolls and, second, 24 rolls of such tape, being

(Deposition of Jen0 F. Paulucci.)

stamped "Paid November 16, 1950." The next one is a similar invoice from El Queeno, dated October 2, 1950, showing the sale of two orders, one of 792 rolls, and the other of 216 rolls of such tape, stamped "Paid February 1, 1951." The next one is a further similar statement showing the sale to plaintiff of 264 rolls of such tape, stamped "Paid November 16, 1950." The next one is a similar statement dated October 9, 1950, showing the sale of 144 rolls of such tape, marked "Paid February 27, 1951." The next similar statement shows a sale of two items, one, 278 rolls and the other 108 rolls of such tape to the plaintiff, stamped "Paid February 1, 1951." The next one is a statement from Duluth Paper & Specialties Company to the plaintiff, showing the sale of 600 rolls of such tape, stamped "Paid December 21, 1950." The next one is a similar statement showing the sale of 551 rolls of such tape, and stamped "Paid December 21, 1950." The next one is a statement from El Queeno to the plaintiff, showing the sale of two items, one, 298 rolls, and the other 468 rolls of such tape, stamped "Paid February 27, 1951." The next one is a similar statement showing the sale of two items, one, 105 rolls, and the other 24 rolls of such tape to the plaintiff, stamped "Paid February 27, 1951." The next one is a further similar statement, dated December 14, 1950, showing the sale of two items, one, 286 [104] rolls and the other 100 rolls of such tape, stamped "Paid February 27, 1951."

Q. Now, Mr. Paulucci, those statements that I

(Deposition of Jeno F. Paulucci.)

have identified show the sales of tape to that extent to the plaintiff corporation, do they not?

A. No.

Q. What do they show?

A. They show listings of tape invoices, packing slips, bills of lading, confirming orders, an assortment. [105]

* * * * *

Q. Are these records for 1949 and 1950 that have been produced here all the records that you have showing purchases by your company during those years?

A. To the best of our knowledge, yes. [108]

* * * * *

Q. Let us go through these 1951 records too, while we are about it. A. Yes, sir. [109]

Mr. Harris: This is the file that counsel has produced bearing the legend "1951."

The first invoice in that file is an invoice to you from El Queeno dated January 2, 1951, showing the sale to you of two items, 58 rolls and 228 rolls of such tape, marked "Paid March 16, 1951." The next one is a similar invoice dated January 10, 1951, showing the sale to you of 148 rolls and 200 rolls of such tape, being marked "Paid March 16, 1951." The next statement is dated January 10, 1951, showing the sale of 360 rolls of such tape, and marked "Paid March 16, 1951." The next one is a similar invoice, dated January 17, 1951, showing the sale of two items, one, 216 rolls and one,

(Deposition of Jeno F. Paulucci.)

468 rolls of such tape, marked "Paid May 3, 1951." Then the next one is a similar invoice dated January 18, 1951, showing a similar sale of 108 rolls of tape, and marked "Paid May 3, 1951." Next, there is a statement from Duluth Paper & Specialties Company to you dated March 27, 1951, showing the sale by it to you of 1152 rolls of such tape, marked "Paid April 6, 1951." Next, there are two—there is a loose invoice to you from Duluth—

Mr. Lyon: You just read that.

Mr. Harris: No, I did not. It is dated February 14, 1951, showing the sale of 752 rolls of such tape, marked "Paid February 23, 1951." The next one is a similar invoice dated February 7, 1951, showing the sale to you of 400 rolls [110] of such tape—

The Witness: You are duplicating it, aren't you?

Mr. Harris: —marked "Paid February 16, 1951."

Q. Will you point out what has been duplicated?

A. Aren't you duplicating? You got 1152 on this record. I don't know if it refers to this one, but the two there make 1152.

Q. These invoices are marked "Paid"—

A. That is correct.

Q. —in February, whereas this invoice, the statement I read is marked "Paid" in April.

A. Yes, sir, and there might be other invoices in here also, other statements covering that item. Here is 1152, marked April 27th. Here is 1440 marked April 9th. [111] * * * * *

(Deposition of Jeno F. Paulucci.)

Mr. Harris: Here is a further statement from Duluth Paper to the plaintiff. This statement is dated March 29, 1951, showing the sale of two items, 60 rolls and 1440 rolls of such tape, stamped "Paid April 9, 1951." The next document is a similar statement dated April 17, 1951, showing the sale of 1152 rolls of such tape, having the date stamp of April 27, 1951. The next one is an invoice from Duluth, covering 912 rolls, the invoice showing a shipment date of April 27, 1951, and being stamped "Paid May 7, 1951." The next one is a similar invoice showing a shipment date of May 10, 1951, and showing the sale of 240 rolls of such tape, being marked "Paid May 18, 1951," and the last one is a similar invoice showing the sale of 1152 rolls, bearing a shipping date of May 10, 1951, and a date of payment on May 18, 1951.

Q. And your statements as to the meaning of those records in 1951 are the same as you previously have given with regard to the records in 1949 and 1950, are they?

A. I feel that there are invoices and statements in there which will duplicate one another, as stated to you.

Q. Well, why do you feel that, Mr. Paulucci?

A. Because of the nature of the invoices, and the way the statement is different colored—a different sized piece of paper, and one is marked an invoice and the other one is more or less a statement showing invoice numbers. [112]

(Deposition of Jeno F. Paulucci.)

Q. Will you take this last file, the 1951 file, and pick out any of the duplications that you believe exist?

A. I think any of the Duluth Paper Specialties ones, where he has listed invoices and also a statement, that there would be some duplications there.

Q. Do you know of any such duplications?

A. I do not know of any, no, sir.

Q. Can you tell us about how many of these double can packs you sold in the year 1950?

A. No, sir.

Q. Or the year 1951 up to May 14th?

A. No, sir.

Q. Can you even estimate how many you sold?

A. I would not want to estimate it.

Q. You mean you are unable to?

A. I would say so, yes.

Q. In these years 1949, 1950 and 1951, has the plaintiff Chun King Sales, Inc., sold anything other than these multiple can packs? A. Yes.

Q. What? A. A variety of other items.

* * * * *

Q. Well, I am afraid I am not clear. Certainly the record, I don't think, is clear. The question was, during the years 1949, let us start with 1949, did you sell any products except in these multiple can packages?

A. Oh, I see. Well, then I might have given you the wrong answer.

Q. Yes, I thought you misunderstood the question. A. Yes. [114]

(Deposition of Jen0 F. Paulucci.)

Q. Straighten it out now, if you will.

A. Will you read me the question again?

(Record read by reporter.)

The Witness: Could we strike that?

Q. (By Mr. Harris): Just explain it.

A. It is hard for me to give you any definite breakdown of what items we had other than multiple items, as you mentioned, in 1949, because each year we kept adding some items, so I would give you the best of my knowledge in those particular years; do you follow me?

Q. Yes.

A. In 1949, in addition to the multiple units, I suppose we had "303 Chicken Chow Mein"; "303 Sprouts"; "303 Vegetable Chow Mein"; "303 Vegetables"; "Chop Suey Vegetables"; "303 Noodles"; "No. 2 Noodles"; "Soy Sauce"; and then "Gallons of Sprouts," "Gallons of Vegetables," "Gallons of Noodles," "Gallons of Soy Sauce."

Q. And those were all sold in single can packages; is that right?

A. Yes, they were sold in single cans.

Q. And how about 1950?

A. Let us get back to the question, your first question says what items other than multiple ones?

Q. Yes, that is right.

A. But part of these items that I have listed for you were also sold in multiple items. [115]

Q. Yes, I understand that.

A. So I don't want to conflict with this question.

Q. I understand that. That is fine. The point is:

(Deposition of Jen0 F. Paulucci.)

You did sell products other than in the multiple can packages?

A. Yes, sir, yes, sir.

Mr. Lyon: And many of them.

Q. (By Mr. Harris): And the same is true in 1950 and 1951? A. Yes, sir.

Q. In 1949 about what percentage of your gross business was done in the multiple can packages?

A. I cannot tell you that.

Q. How about 1950?

A. I could not tell you for any years. [116]

* * * * *

Q. What similarities are there in the use of the tape on defendant's product exemplified by Exhibit 4 and the use of the tape on your product, exemplified by Exhibit 1?

A. The banding of the two cans together, as per our patent.

Q. What do you mean "as per your patent"?

A. Applying the tape around the cans in such a way [147] that tension is used in order to bind them together.

Q. As a matter of fact, the only similarity, so far as the tape is concerned on the product, is that each of them contains two or more cans bound together with a sticky tape, is it not?

A. That is not true.

Mr. Lyon: That is objected to as argumentative.

Q. (By Mr. Harris): May we have an answer, please? A. That is untrue.

Q. What other similarities are there?

(Deposition of Jeno F. Paulucci.)

A. I believe I have completed the resume of similarity as I see them now.

Q. You know of no other similarities in the use of the tape other than those you specified; is that correct?

A. At the present moment that is all I can say.

* * * * *

Q. Paragraph V of the Complaint alleges "Plaintiff Jeno F. Paulucci conceived, developed and perfected certain novel and unique methods and apparatus for rigidly and positively securing cans together in an end-to-end relationship."

What were those novel and unique methods that you perfected?

A. The taping of two cans together in the end-to-end fashion, as outlined in the patent.

Q. There is only one method outlined in the patent, [163] is there not?

A. There is only one method that I know of of applying the tape.

Q. And what were those novel and unique apparatus referred to in this paragraph of the Complaint, the apparatus shown in the patent in suit?

A. That is correct.

Q. What is novel and unique about this method referred to in Paragraph V of the Complaint?

A. Uniting those two cans together so that they will stay in end-to-end fashion without coming apart.

Q. How is that done?

A. By applying tension to the tape in such man-

(Deposition of Jenó F. Paulucci.)

ner that the two cans are practically welded together by the tape.

Q. If you don't apply tension you cannot get the result of this method of yours; is that correct?

A. That is correct.

Q. What is novel about the apparatus referred to in this paragraph?

A. Well, I am not—I don't know exactly what you are driving at or mean, but it is novel to the extent that it is a means to the end, and that is applying the tape with tension to the two cans, as outlined in the patent.

Q. Are there any novel features of the apparatus?

A. As I have answered before, novel to the—as [164] being a means to an end.

Q. So that the only thing novel in the apparatus is an apparatus which can certainly be used to join two cans together with a sticky resilient tape; is that right?

A. Not only that, but without that apparatus as is you would not get the results, we feel, of the tension with the tape.

Q. What is unique about the apparatus, if anything?

A. Unique in the—again I say unique as a means to the end of having the two cans taped together with tension, so that they are practically welded to one another.

Q. How much tension do you put on the tape when you are practicing this method?

(Deposition of Jeno F. Paulucci.)

A. Sufficient to cover the contours of the can over the beads.

Q. Can you specify that in terms of any particular amount of pull on the tape?

A. I cannot.

Q. Do you have to determine that by experiment with each particular type of tape?

A. I would say that would have something to do with it.

Q. You can't tell anybody how hard to pull this tape to accomplish this result, can you?

A. I can show them, yes.

Q. Just hard enough to have the tape go on smoothly [165] without wrinkles; isn't that a fact?

A. No, sir.

Q. How hard do you pull it?

A. I answered you before, go around the contours of the beads and onto the label on the edge of the can.

Q. Hard enough to make the tape go on the can properly, but not hard enough to break the tape; is that a fair statement? A. No, sir.

Q. If you were going to tell anybody how hard to pull the tape to apply it to a can, in practicing this method alleged in Paragraph V of the Complaint, how hard would you tell them to pull the tape?

A. I would show them.

Q. You could not tell him how hard to pull it?

A. I suppose I could tell it, yes.

Q. How hard would you tell them to pull?

(Deposition of Jeno F. Paulucci.)

A. Hard enough so that he doesn't break the tape.

Q. Any tension short of breaking the tape would be adequate; is that correct?

A. No, sir, it depends on the tape.

Q. And the user would have to experiment to determine how hard that would be?

A. If he was using different types of tape I would suggest it would be a good idea. [166]

* * * * *

Q. None of the tape which you have purchased to practice the method of the patent in suit, however, has been specially made for such use, has it?

A. No, sir.

Q. It is just a commodity sold on the open market, is it not?

A. I would not know for certain, but I would say so, yes. [170]

Q. Do you find that some tapes are more adaptable for use in this method of the patent in suit than other tapes?

A. The answer to that would be apparently yes. It depends on the supplier and the type of tape he manufactures.

Q. However, this extensive testing referred to in Paragraph VI of the Complaint did not involve the selection of the proper tape, did it?

A. No, we believed that was very much secondary.

Q. What was the problem that required this extensive testing?

(Deposition of Jeno F. Paulucci.)

A. Keeping the two cans together so that they would not come apart.

Q. And just what was it that finally gave you success in that regard?

A. The tension on the label, so that it went to the contours of the beads onto the can and welded them practically into one.

Q. You said "the tension on the label." I think you misspoke yourself.

A. The tension on the tape, I am sorry.

Q. And that was the only thing that created this problem, was it?

Mr. Lyon: What do you mean? I think you had better read your question.

Q. (By Mr. Harris): Excuse me, the only thing that solved the problem. [171]

A. It was the end result that solved it. There were many ramifications that entered into it. [172]

* * * * *

Q. Mr. Paulucci, in the practice of the method of the patent in suit, is it important to apply the tape over the beads on the cans and adjacent side-walls while the tape is in a stretched condition?

A. It is. [177]

Q. Is that essential to the practice of this method? A. Under tension, yes.

Q. How much do you have to stretch the tape?

A. Enough to go around the contours of the beads onto the sides of the cans in order to bring it into a—as if they were practically welded together.

(Deposition of Jeno F. Paulucci.)

Q. Is any particular resiliency required in tape for practicing this method?

A. What do you mean by "resiliency," that word?

Q. The patent says it must be a resilient tape. How resilient should the tape be?

A. Sufficient to go around the contours of the beads onto the can in order to weld them in a position where the two cans are practically welded together.

Q. The patent also refers to the tape as being sticky. How sticky does the tape have to be?

A. Sufficiently to keep those cans welded together in the fashion described above.

Q. In practicing this method of the patent in suit is it essential you rotate the cans?

A. I know of no other way you could do it.

Q. In your present——

A. I would like to amend that at this point that if the cans were rotated at least the tape would have to be rotated around them in such manner as to go around the contours of the beads of the cans with tension. [178]

Q. The only difference in the method practiced by you prior to August, 1951, in your commercial operations in securing together two or more cans in end-to-end alignment, and with a resilient sticky tape, and your practice of the method of the patent in suit commercially after that date was the use of more tension on the tape while the tape was being applied to the cans, was it not?

(Deposition of Jen0 F. Paulucci.)

A. That was one of them, yes, sir; the major one.

Q. What other differences were there in the practice of the method?

A. The apparatus used.

Q. So far as the method is concerned of applying the tape to the cans, that was the only difference, was it not? A. No, sir.

Q. What other differences were there?

A. The condition of the cans, the weight of the cans.

Q. What do you mean by "the condition of the cans"?

A. Whether the cans were greasy on the beads.

Q. You found, did you, that in practicing the method of the patent in suit the beads of the cans should not be greasy?

A. No, sir, I did not say that.

Q. So that isn't an important feature of the thing? A. What did you say, sir?

Q. That is not an important feature in the situation? A. That is not true. [179]

Q. You mean it is an important feature?

A. It contributes to the over-all, yes, sir.

Q. In your practice of such earlier method prior to August of 1951 how did you guide the tape onto the cans?

A. It wasn't guided, as I mentioned to you before. It was pulled out, and the cans were more or less rolled into the tape.

(Deposition of Jeno F. Paulucci.)

Q. The tape was merely guided and supported by the hand of the operator, was it not?

A. More or less.

Q. And that is true in your practice of the patent in suit, is it not?

A. Not in the same manner, no, sir.

Q. How do they differ?

A. The tape was loose before, it was not under tension.

Q. That is the only difference?

A. The tape before was pulled out and the cans were rolled into the loose tape.

Q. And now how do you do it?

A. Under tension.

Q. You just put more tension on the tape; is that correct?

A. The tape is now pulled out loose.

Q. You put tension on the tape now where you didn't do it before? [180]

A. The tape was loose before also.

Q. Is the v-shaped trough shown in your patent in suit and identified by the numeral "6" essential to the apparatus shown there?

A. I would say yes.

Q. In the practice of the method of the patent in suit, is there any particular importance in the spacing of the tape dispenser from the cans themselves?

A. I would say yes.

Q. And what determines that spacing?

A. The speed of operation, the type of tape, the products.

(Deposition of Jeno F. Paulucci.)

Q. The only importance is, is it not, to permit you to cut off the length of tape on the cutter of the apparatus just long enough to go around the cans that are being packed? A. Not necessarily.

Q. In practicing this method does the plaintiff always have the one end of the tape overlap the other end of the tape as applied to the cans?

A. Other than the human error, yes.

Q. When you were speaking of differences between your old method prior to the invention of the patent in suit for joining together two cans, as you have described, and the method of the patent in suit, you mentioned that the weight of the cans is a factor in the situation. How [181] does the weight of the cans affect the practice of the method?

Mr. Lyon: I think it is a misquotation of the witness' testimony.

Q. (By Mr. Harris): I will ask him: Does the weight of the cans have anything to do with the practice of the method of the patent in suit?

A. Not the methods, no, sir. [182]

* * * * *

[Title of District Court and Cause.]

NOTICE OF DEPOSITION AND PRODUCTION OF DOCUMENTS

To: Chun King Sales, Inc. and Jeno F. Paulucci, Plaintiffs, and Messrs. Williamson, Schroeder, Adams & Meyers, Everett J. Schroeder, Esq., Lyon & Lyon, Lewis E. Lyon, Esq., and R. Douglas Lyon, Esq.:—

Please Take Notice That on May 18, 1955, at the hour of 10:00 o'clock a.m. at 321 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California, on behalf of the defendant in the above-entitled action, we shall take the deposition of plaintiff Jeno F. Paulucci, as an individual plaintiff and as president of plaintiff Chun King Sales, Inc., and he is requested to so appear and permit the taking of his deposition.

Plaintiff Jeno F. Paulucci is hereby requested to produce at said time and place and permit the inspection of any and all of the following written records, memoranda, drawings, correspondence, and other documents in the possession of or under the control of the plaintiffs or either of them:

(a) Those referring or relating to, or evidencing, the earliest date of conception of the alleged inventions of Letters Patent No. 2,679,281 in suit by the inventor or patentee thereof;

(b) Those referring or relating to, or evidencing, the earliest date or dates of reduction to practice of the alleged inventions of Letters Patent No. 2,679,281 in suit;

(c) Those referring or relating to, or evidencing, participation of James Bingham and any other person or persons in both the conception and reduction to practice of the alleged inventions of Letters Patent No. 2,679,281 in suit;

(d) Those referring or relating to, or evidencing, consultations in the years 1949, 1950, and 1951 be-

tween plaintiffs, and either of them, and representatives of Minnesota Mining and Manufacturing Company of St. Paul, Minnesota, relating to any and all of the alleged inventions of Letters Patent No. 2,679,281 in suit and/or the fastening together of two or more containers by the use of a sticky tape;

(e) Those referring or relating to, or evidencing, the earliest sales by the plaintiffs, or either of them, of two or more cans connected together in an end-to-end relationship and as a single unit as referred to in Paragraph X of the Complaint in this action;

(f) Those referring or relating to, or evidencing, all sales by plaintiffs, and each of them, during the years 1949, 1950, and 1951 (up to May 14, 1951) of products made with or by the alleged inventions of Letters Patent No. 2,679,281 in suit;

(g) Those referring or relating to, or evidencing, all purchases by plaintiffs, and each of them, during the years 1949, 1950, and 1951 (up to May 14, 1951) of sticky tape adapted to be used in practicing the alleged inventions of Letters Patent No. 2,679,281 in suit;

(h) Those referring or relating to, or evidencing, all purchases by plaintiffs, and each of them, during the years 1949, 1950, and 1951 (up to May 14, 1951) from Minnesota Mining and Manufacturing Company of St. Paul, Minnesota; Industrial Tape Corporation, Permasel Tape Corporation of New Brunswick, New Jersey, Technical Tape Corporation of New York, New York, and all jobbers and dealers selling the products thereof;

(i) A true copy of the license referred to in Paragraph IX of the Complaint in this action;

(j) Copies of any and all advertising and displays relied upon by plaintiffs, or either of them, in support of the averments of Paragraph XI of the Complaint in this action;

(k) Those referring or relating to, or evidencing, any recognition of the purchasing public as referred to in Paragraph XII of the Complaint in this action;

(l) Those referring or relating to, or evidencing, the alleged enviable reputation referred to in Paragraph XV of the Complaint in this action;

(m) A sample of each type of product sold by the defendant as referred to in Paragraph XVI of the Complaint in this action;

(n) Those referring or relating to, or evidencing, that the purchasing public have been deceived and misled into purchasing defendant's oriental-type food products instead of the products of plaintiff Chun King Sales, Inc., as averred in Paragraph XVII of the Complaint in this action;

(o) Those referring or relating to, or evidencing, that any products of defendant are of an inferior grade to those of plaintiff Chun King Sales, Inc., as averred in Paragraph XVIII of the Complaint in this action;

(p) Those referring or relating to, or evidencing, that any of the defendant's acts has damaged the

business reputation or good will of plaintiff Chun King Sales, Inc., as averred in Paragraph XVIII of the Complaint in this action; and

(q) Those referring or relating to, or evidencing, that plaintiffs, or either of them, have lost any sales or business as a result of any act of defendant, as averred in Paragraph XIX of the Complaint in this action.

Dated: May 6, 1955.

HARRIS, KIECH, FOSTER &
HARRIS

/s/ By FORD HARRIS, JR.,
Attorneys for Defendant

[Endorsed]: Filed Nov. 21, 1955.

* * * * *

JOHN W. KESTERSON

called as a witness on behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Harris): Mr. Kesterson, did you ever see the defendant, Oriental Foods, taping cans together in end-to-end relationship by a sticky resilient tape? A. Yes, I did.

Q. When did you first see that done?

A. As I recall, it was in June of 1949. [370]

Q. How long did that continue?

A. Well, I would say around six or eight months at that time.

(Testimony of John W. Kesterson.)

Q. How was it done, manually, or by a machine?

A. It was done manually.

Q. Will you please describe in detail the steps that were employed at that time to accomplish that?

A. Well, we had ladies doing the work, and they would pick up one can and then place another one on top of it in the palm of their hand.

Q. Which hand?

A. Well, it would be the left hand, if they were right handed. Then they would take a piece of tape long enough to go round the can, placing it on with their thumb——

Q. Placing what on with their thumb?

A. The tape on to the seams of the cans.

Q. All the tape at one time?

A. No, just the end, and then they would pull it around, exerting enough pressure to put it so that it would adhere to the side walls of the cans, and also stick to the seams.

Q. What do you mean, pulling it around?

A. Well, by rotating the can, and holding on to the end of the tape and pulling on it, it would go around the end of the can, and make a neat job.

Q. Does the defendant, Oriental Foods, [371] tape cans together manually at the present time?

A. Yes, they do.

Q. How does the present operation differ, if it differs, from the one practiced in 1949?

A. Well, I wouldn't say that it differs at all.

Q. I show you Plaintiffs' Exhibit 12, and ask

(Testimony of John W. Kesterson.)

you if you recognize that taping operation illustrated by that can? A. Yes, I do.

Q. What is that?

A. Well, it differs slightly from the one we did in '49, due to the fact that we don't put the tape all the way around.

Q. You mean in this exhibit the tape does not go all the way around; is that correct?

A. That's right, yes.

Q. Whereas, what was the situation in 1949?

A. Well, we did put the tape all the way around the can.

Q. Other than that, does the present operation differ from the 1949 operation?

A. No, practically the same.

Q. How many cases of cans of food were taped together as you described in 1949 by the defendant?

A. Well, I couldn't give you the exact [372] amount, but it was well over—in the thousands.

Q. And what was done with the product from that taping operation?

A. They were cased and sold.

Mr. Harris: That is all. Counsel may cross examine.

The Court: All right, Mr. Lyon.

Cross Examination

Q. (By Mr. Lewis E. Lyon): Mr. Kesterson, it is my understanding of your testimony that there was an attempt to tape some cans together in 1949. How do you fix that date?

(Testimony of John W. Kesterson.)

A. Well, it was around June of '49, as I recall.

Q. How do you fix '49 instead of '50, '51 or '52?

A. Well the question was, when did I first start taping the cans, was it not?

Q. The question is, how do you fix it as either '51 '50, '49? How do you fix the date as being 1949?

A. Well, that is when we started the taping operation, in '49.

Q. Well, have you any records of that?

A. I don't have, personally. I am sure the company——

Q. Did anything particular occur in your life in 1949, that enables you to fix the date as 1949, to differentiate it from any other year? [373]

A. Well, I can't say, except that I just recall that it was in 1949. I know that it was.

Q. Now, your statement was that the women took a piece of tape that was cut off from a roll—a piece of tape like that (indicating); is that correct?

A. That's right.

Q. And they took cans, and they piled one can on top of another, and then they held both cans together, is that right, with one hand? A. That's right.

Q. And they applied a piece of tape around here, and then they rotated the tape, is that correct? Or did they rotate the can, or did they rotate the tape?

A. They rotated the can in their hand, holding the tape.

Q. They rotated the can in their hand, holding the tape. And they rotated it like this (indicating); is that correct? A. In that manner, yes.

(Testimony of John W. Kesterson.)

Q. And they came out with something about like that (indicating), is that it?

A. No, they came out with a neater job than that.

Q. When was it that they stopped this operation?

A. I believe it was around the first of the year in 1950.

Q. Why? [374]

A. Why did they stop the operation?

Q. Yes.

A. Well, we went into a different container.

Q. I see. They didn't start up taping again until some time in 1954; is that correct?

A. I believe that would be correct.

Q. In this operation shown by Exhibit 11, which is the one which was recently produced by the defendant—when was that done?

A. Well, I couldn't give you the date when that particular can was taped.

Q. You know that cans have code numbers on them, do you not? A. Yes, I do.

Q. Are you familiar with the defendant's code?

A. Well, that code may have been changed since.

Q. Well, this was a late 1955 operation, was it not?

A. Well, it could have been in the latter part of '54, too.

Q. When did you bring out this particular label of Exhibit 11?

A. I can't recall the exact date on that, either.

Q. But it was in 1955, wasn't it?

(Testimony of John W. Kesterson.)

A. I believe it was, yes.

Q. All right. Now, you don't recall from the [375] code number that is on the bottom of that can as to what that code is? Would you look at it?

A. No, I can't give you the date on that.

Q. Isn't it a fact that in your operations, as shown by Exhibit 11, that if you pull the tension on the tape correctly you cause the tape to stretch around the beads of the can, and adhere to the side walls of the can, you can eliminate some of the tape, so that you don't have to carry it all the way around the can?

A. Yes.

Q. And that is what you are doing now?

A. That is true.

Mr. Lewis E. Lyon: That is all.

Mr. Harris: No further questions.

The Court: All right.

(Witness excused.)

Mr. Harris: I will call Mr. Jaisohn Hyun to the stand.

JAI SOHN HYUN

called as a witness on behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Harris): Mr. Hyun, when did Oriental Foods, the defendant, [376] first start to tape cans together on end-to-end relationship with a sticky resilient tape? In June, 1949.

Q. How long did it continue to do so from that date?

(Testimony of Jaisohn Hyun.)

A. Up to the beginning part of the year 1950.

Q. Will you please describe the taping operations that were done in your plant in 1949?

A. Yes. The female packer would take and grab the can with the chop suey in it, and with the other hand place a can of chow mein noodles on top of it. Then with the right hand she would take a piece of tape, and the measure had been predetermined.

Q. How long a piece of tape?

A. Enough to go around the circumference of the cans and slightly overlap those approximately a quarter of an inch.

Q. Then what would she do?

A. She would tack down the leading edge of the tape in the center, where the cans joined, and by a twofold operation manually of rotating the cans with the left hand together, and pulling and guiding the tape with the right hand, the trailing edge of the tape, she would bind the two cans together, stretching and pulling and trying to get it to conform to make a tight connection.

Q. Connection with what? [377]

A. Trying to connect the two cans together securely, and have the tape do that job by definitely connecting the cans in a strong connection, and, also, to get the tape down on the paper label, which was important. We wanted to get that tape down on the label.

Q. Why was it important to get the tape down on the label?

A. Well, we had experienced—because the one

(Testimony of Jaisohn Hyun.)

can was sold with the second can for a penny, we had discovered that some groceries would take the units apart and sell both units separately for their real value.

Now, if we placed the tape around and had it on the paper label, when the grocer attempted to take the tape off, he would tear some of the label, therefore making the product somewhat unsalable.

Q. How many girls or women did you have at Oriental Foods in 1949 so taping cans together?

A. Generally, about six to eight in a group or a crew, and it could be anywhere from a dozen to two dozen taping at one time.

Mr. Harris: I produce a folder containing what appear to be a number of business records, which I ask be marked for identification as defendant's exhibit next in order.

The Clerk: Defendant's AE, for identification.

(The document referred to was marked Defendant's Exhibit AE, for identification.)

Mr. Harris: I show this exhibit that has been marked for identification to opposing counsel.

(The document was handed to counsel.)

Q. (By Mr. Harris): Mr. Hyun, what is Defendant's Exhibit AE, for identification?

A. It is a copy of an invoice,—

Q. No, excuse me. The exhibit is the whole file.

A. Yes. This is a file of invoices accompanied with delivery tickets signed by the recipient of the merchandise.

Q. In connection with that?

(Testimony of Jaisohn Hyun.)

A. In connection with our taped one cent sale deals. There is also a voucher from the check, which is attached in most cases, indicating the payment thereof for that merchandise.

Q. Picking out one of these clipped together groups of paper at random, will you just explain what that is? What is the green paper, first of all?

A. This is an invoice. It is our office copy record of the invoice, which indicates that 15 cases of taped Jan-U-Wine one cent sale deal in the chicken variety were sold to the Market Wholesale Grocery Company on June 17, 1949.

Q. What is that invoice? Was that sent to the customer,—the original? [379]

A. This is the office copy of the invoice. This invoice copy was maintained in the office.

Q. Then what is the white document attached to that?

A. It is entitled a delivery memo, indicating that these cases were shipped to Market Wholesale Grocery Company, and signed and receipted for.

Q. On what date? A. On June 17, 1949.

Q. Then what is the third yellow document attached to that?

A. The third yellow document is a voucher from a check, indicating that this particular invoice is paid and discounted, and on the front—this green copy, then being an accounting department copy, is stamped and marked paid, with this check voucher number on the back, indicating that that has been a completed transaction; an order, a sale, a delivery,

(Testimony of Jaisohn Hyun.)

a receipt, and a payment received thereof, completing the transaction.

Q. How many cases does that particular group of documents relate to, that one you had in your hand?

A. This refers to actually 15 cases. I notice that the delivery memo was originally written on June the 9th, and the reason for that is that this is a—some of the one cent sales were back ordered, and that is why we had the final shipping date and the invoice date of the 17th. [380]

Mr. Harris: I ask that this particular group of three papers be marked as Defendant's Exhibit AE-1, and I offer it into evidence as such.

The Court: It may be received.

(The document referred to was marked Defendant's Exhibit AE-1, and received in evidence.)

[See Book of Exhibits.]

The Court: So long as I made one indication in one way, I want to make another indication in another way.

I am not impressed very much by any argument made by the plaintiff relating to imitation of sales. One cent sales have been known for many, many years, and are indulged in by many people, so the mere fact that the man applies it to this type of food does not give him the right to exercise it against anyone else. The only materiality of the

(Testimony of Jaisohn Hyun.)

sale is background, and if there was not in those sales any imitation of label or lettering, it would have no bearing upon any issue of infringement or unfair competition.

Nobody can claim the right to be the first one to introduce that in food sales. You can pick up the Wednesday advertisements in the Los Angeles afternoon papers—that is the market day—and you will find Thriftys advertising one cent sales on all sorts of brand products, pharmaceutical products, tooth pastes, and others, and they even issue a catalog. So that I don't think anybody is going to contend that Chun King acquired the sole right of applying [381] the one cent sale to chop suey or Chinese foods.

Mr. Lewis E. Lyon: That isn't our purpose in that showing at all, your Honor. It is the only one step in the series. We don't claim any right or privilege, or sole right to sell a one cent sale, and then if there isn't label copying, or a copying of something else. The fact it is a one cent sale has nothing whatever to do with it.

The Court: Then we agree on that. Then I do not see where it is of any great significance to show when he began to make one cent sales. If there is no imitation of label, counsel and I agree that it has no significance.

Mr. Harris: I don't agree with that, if the court please, because this evidence has this additional import. If the defendant's taping operations today infringe the patent in suit, his taping operations in

(Testimony of Jaisohn Hyun.)

1949 anticipated the patent in suit. It was a prior public use by the defendant of the same thing he is doing today.

The Court: I am not trying to deprive you of the defense of anticipation. I am aware that you are urging anticipation.

Mr. Harris: I just wanted to point that out.

The Court: They are not claiming the sole and exclusive right to tape, either. They are claiming the sole and exclusive right to tape under the process described in the patent.

Mr. Harris: Thank you, your Honor. I am very glad you [382] brought that out, because that is a primary point.

At any rate, may I continue with the proof?

The Court: No, you cannot extend the scope of a patent. We get back again to the proposition I adverted to in the beginning, and that is to the two shoe cases, the Solnit and the Joyce cases. In that case Mr. Joyce thought he had a patent to any kind of a platform shoe, but if he had that, he had nothing, because platform shoes have been known for hundreds of years, and you can find them illustrated in Chinese art over the centuries.

Then when we limited them to a peculiar way of achieving a platform shoe, that is, to a one-piece encased in a sole, then we limited the scope of the patent, and we judged every one. Some of them I found infringed. In the Solnit case, where they put in, instead of one piece, several pieces, we found they did not.

(Testimony of Jaisohn Hyun.)

This is a very narrow patent, and, apparently, a very simple patent, but which, of course, does not deprive it of the right to be patented.

I do not agree, as I have told you, and everybody in the patent bar, with that unfortunate phrase of Mr. Justice Douglas, that a patent must represent a spark of genius. If that were true, some of the most valuable patents, including the zipper, would not be worth very much, because they do not represent genius. On the contrary, the zipper patent [383] represented sloppy workmanship instead of good workmanship, because perfection in the zipper resulted in a stiff surface, while the man who made the elements loose, in an unworkmanlike manner, got something that nobody else had had. He had a zipper that could be applied to the inside of a portfolio, to the top of a bag, and to almost anything, to a man's clothes and to a lady's dress, and not be stiff.

However, I don't think that it is claimed, on that it could be claimed that the taping together of two cans is patentable. What they have in the patent and in claim I is merely a method of applying a certain tension, and having the cans—not "beveled"—what is the word you used?—having them serrated and achieve a strong union. That is all they claim. [384]

* * * * *

Q. (By Mr. Harris): Mr. Hyun, I show you a second group of three papers from this file, Defendant's Exhibit AE, and ask you if that is the

(Testimony of Jaisohn Hyun.)

same sort of thing as AE-1, I just showed you a minute ago? A. Yes, it is.

Q. And how does this show any sale as of that date? By the way, what is the date of this exhibit?

A. June 17, 1949.

Q. What is on there to show that it was a sale of a taped product, such as you testified to?

A. The description is, "Jan-U-Wine 1c Sale (Chicken)."

Q. I note on this one there are a number of other items: Jan-U-Wine combination deal, Jan-U-Wine bean sprouts, and so forth. Do those have anything to do with taped products?

A. No, they don't.

Q. How many cases does that particular group of papers indicate were sold of the taped product?

A. Ten cases, and 15 cases on back order.

Mr. Harris: This is offered into evidence as the [385] Defendant's Exhibit AE-2.

The Court: All right. It may be received.

(The document referred to was marked Defendant's Exhibit AE-2, and received in evidence.)

[See Book of Exhibits.]

Q. (By Mr. Harris): Mr. Hyun, approximately how many cases of the taped product did you sell in 1949, as shown by these records that you have before you?

A. I ran a rough tape on these. Unfortunately, this file covers only the period June through September.

(Testimony of Jaisohn Hyun.)

Q. And how many cases were sold during that period? A. 1,916 cases.

Q. Does that cover all customers?

A. No. Incidentally, this is predominantly one customer.

Q. Did you sell to other customers?

A. Yes, we had it open to all customers at this time.

Q. And did you continue to sell in 1949, after September of 1949? A. Yes.

Q. Mr. Hyun, I show you Plaintiffs' Exhibit 47. What, if anything, does the blue color splash indicate on that carton.

A. It is what we call a color coding or identifying color, a particular color for a particular product.

Q. In this particular case in this exhibit, what does [386] the color indicate?

A. Light blue indicates the chow mein-noodle product.

Q. Have you done that with your other products, as well as chow mein-noodles?

A. Yes, we have attempted to do it with all of our products.

Q. Will you please explain to the court the history of this color coding, using color to identify a particular product, so far as your business is concerned?

A. Yes. I think I can start out and say this, that because of the nature of our products, a canned Chinese food product, a lot of education to the

(Testimony of Jaisohn Hyun.)

consumer must be done. Naturally, it is up to the packer to assume the initiative.

So we wanted to — first of all, we had to go through the grocer to get our products recognized by him, before he would then, of course, pass it on to the consumer. So we thought that by color coding our products on our labels, and our shipping cases, there would be a certain amount of recognition being done, a certain amount of education being done by us, to further this educational program that we had in mind.

Q. Now, will you briefly review the history of that, so far as color coding on your cartons is concerned?

A. Yes. We started out with printing cartons in a color in the '30s on our soy sauce bottle, and we used the same color. [387]

Then we decided we must have an identifying color for the product, so in October of 1949 we printed the first bean sprout carton with an identifying color of red.

Mr. Harris: Do you have one of those here in court some place? Can you pick one out?

May the witness step down from the stand to find one of those, your Honor?

The Court: He may step down.

The Witness: This (indicating) is like one of the first cases.

Mr. Harris: May I have this carton that the witness has produced marked as Defendant's Exhibit AF, for identification?

(Testimony of Jaisohn Hyun.)

The Court: It may be marked.

Mr. Harris: And it is offered in evidence at this time.

The Court: It may be received.

The Clerk: Defendant's Exhibit AF identified and admitted in evidence.

(The item referred to was marked Defendant's Exhibit AF, and received in evidence.)

Q. (By Mr. Harris): What is the color coding on this carton?

A. Well, this might seem like a digressive step, moving backward, because we have only the one color. Previously we had our products printed in two colors. This [388] time we printed it all in one color, because for that particular product we chose the red color.

Now, we established red as the basic color, and the second color for the identifying color would be the color of any subsequent products, or any additional products.

Q. What was the next step?

A. The next step occurred on April 27, 1950, where we began to color code the rest of our products.

Chicken chop suey was printed with a basic color, red, and the product name "chicken chop suey" was printed in the light blue.

Q. Would you please produce the chicken chop suey that is coded in red, or one coded in blue, either one?

A. That is not really the case I am after. I just

(Testimony of Jaisohn Hyun.)

couldn't locate any of those older cases that really exemplified the continuity of the complete color pattern.

Mr. Harris: The carton the witness has produced I will ask be marked, and I will offer it in evidence as Defendant's Exhibit AG.

The Court: It may be received.

(The item referred to was marked Defendant's Exhibit AG, and received in evidence.

Q. (By Mr. Harris): And what was the color coding on this particular carton, Mr. Hyun?

A. The color coding there is red for the chicken one [389] cent sale with the rice. The chicken one cent sale with the noodles was the light blue.

Q. All right. Then, what was the next step?

A. We, of course, had—the next step then was, just going back again to this particular carton, of not being enough just to have the product name in an identifying color, because that still only gave us colors, but no pattern. So we started to put a broad stripe all around the case, such as in this case which was just demonstrated, and there are several other cases over there which are more up to date, being printed in the early '50s, which indicate by the color of the stripe the identifying name of the product.

Q. Well, we don't need to take more than one, I think.

A. Now, here is green, and here is orange, and there is a red. We had a blue, a dark blue. We had as many colors as were available.

(Testimony of Jaisohn Hyun.)

Incidentally, at this time in late '49 and early '50 corrugated manufacturers did not have all the inks available to them. They were working with us on developing inks that we could have.

Q. Now, what was the next step, Mr. Hyun, on this carton color coding?

A. Well, the stripe was not yet enough. We discovered that oftentimes little known products, non-staple products, such as ours, were shoved back in the corner of the warehouses [390] or down under a shelf. So we wanted to have more than just a broad stripe. We wanted to have paneling effect. So in April of '52 we ordered the first cartons with the paneling effect, with a color identification.

Mr. Harris: Will you please pick one of those out of these exhibits that we have in the courtroom?

(The witness does as requested.)

Mr. Harris: The witness has selected two further cartons, which I ask be marked, and I offer them into evidence as Defendant's Exhibits AH and AI.

The Clerk: Empty carton of Jan-U-Wine bamboo shoots identified—and admitted into evidence, your Honor?

The Court: They may be received.

The Defendant: As Defendant's Exhibit AH. Empty carton, Jan-U-Wine water chestnuts, identified and admitted into evidence as Defendant's Exhibit AI.

(Testimony of Jaisohn Hyun.)

(The items referred to were marked Defendant's Exhibits AH and AI, and were received in evidence.)

Q. (By Mr. Harris): What was the next step, Mr. Hyun?

A. That ends the pattern in the development so far.

Q. Bringing the pattern up to date, does it?

A. Yes, only just further printing of boxes.

Q. Mr. Hyun, I show you Plaintiffs' Exhibit 13, which is a two-can pack of Oriental Foods, two different cans, bearing on their faces pictures of the contents of the cans. [391] What do you call those pictures of the contents of the cans, in your parlance? A. Vignettes.

Q. When did you start to use vignettes on your products to indicate the nature of the contents of the can?

A. Our first vignette was copyrighted in 1927.

Mr. Harris: Will you produce a sample of that, please.

(The witness does as requested.)

Mr. Harris: I ask that this label be marked as defendant's exhibit——

The Clerk: AJ, for identification.

Mr. Harris: ——AJ.

The Witness: Excuse me, Mr. Harris. I have made an error. That was the second vignette.

Mr. Harris: All right.

The Witness: Actually, that was not copyrighted until 1935.

(Testimony of Jaisohn Hyun.)

Mr. Harris: Will you mark this one, please?

The Clerk: This is AJ, for identification.

Q. (By Mr. Harris): Is my understanding correct that this Exhibit AJ was the second label on which you used the vignetting? A. Yes, sir.

Mr. Harris: This is offered into evidence as the Defendant's Exhibit AJ. [392]

The Court: It may be received.

The Clerk: AJ in evidence.

(The label referred to was marked Defendant's Exhibit AJ and received in evidence.)

Q. (By Mr. Harris): And what was the next label your company used with vignettes?

A. May we precede that one?

Q. Well, it isn't necessary. Let's just go on from the second one that has been identified.

A. The third is a fortune cake label with an over-all vignette background.

Mr. Harris: I ask that this be marked as Defendant's Exhibit AK.

The Clerk: AK, for identification.

Q. (By Mr. Harris): When was this label first put out, Mr. Hyun?

A. That was put out in 1948.

Mr. Harris: That is offered into evidence as Defendant's Exhibit of the same letter.

The Court: It may be received.

The Clerk: AK in evidence.

(The label referred to was marked Defendant's Exhibit AK, and received in evidence.)

(Testimony of Jaisohn Hyun.)

Q. (By Mr. Harris): What was the next vignetted label that you put out? [393]

A. The next group was these two.

Mr. Harris: I ask that these two labels be clipped together, and marked as Defendant's Exhibits AL-1 and AL-2, and be so marked for identification.

Q. Mr. Hyun, when were these labels first used by your company?

A. Between February and April, of 1950.

Mr. Harris: These are offered into evidence as defendant's exhibits next in order.

The Clerk: AL-1 and AL-2,—admitted, your Honor?

The Court: They may be received.

(The labels referred to were marked Defendant's Exhibits AL-1 and AL-2, and received in evidence.)

Q. (By Mr. Harris): And what were the next labels that the defendant employed, using vignettes?

A. I think those are in the Exhibit No. 21.

The Clerk: 21 or 31? 31 is a group of drawings. You mean labels. Is that (indicating) what you want?

Mr. Harris: Yes.

Mr. Tinsley: 32 and 33.

The Clerk: 41.

Q. (By Mr. Harris): Do you have any copy in your possession of what you are referring to, Mr. Hyun?

(Testimony of Jaisohn Hyun.)

Mr. Lewis E. Lyon: It is in one of the envelopes there, 41. [394]

Q. (By Mr. Harris): I show you Defendant's Exhibit—Plaintiffs' Exhibit No. 41-A. Is that what you had reference to?

A. The last admitted into evidence is the same as this exhibit here.

Q. Then there is one later than this; is that correct?

A. Yes. It is in the manila cover.

Q. I show you Plaintiffs' Exhibit 41. Is that what you had reference to? A. Yes.

Q. And that shows the next type of vignetted label which your company put out?

A. No, there is one earlier.

Mr. Harris: The witness has produced three labels which I ask be clipped together and be marked as the defendant's exhibit next in order, -1, -2, -3.

The Clerk: Do you want these as AM?

Mr. Harris: AM-1, -2, -3.

The Clerk: AM-1, AM-2, and AM-3, marked for identification.

(The labels referred to were marked Defendant's Exhibit AM-1, AM-2 and AM-3, for identification.)

Q. (By Mr. Harris): When were these three labels first put out by your company, Mr. Hyun?

A. In October of 1953. [395]

Mr. Harris: These three labels are offered into evidence as defendant's exhibits next in order.

(Testimony of Jaisohn Hyun.)

The Clerk: AM-1, AM-2, and AM-3,—admitted in evidence, your Honor?

The Court: They may be received.

(The labels heretofore marked Defendant's Exhibits AM-1, AM-2 and AM-3 were received in evidence.)

Q. (By Mr. Harris): Mr. Hyun, why did your company, Oriental Foods, discontinue taping cans after 1949?

A. Well, we had run the product, the taped product, as a sale, and we thought we would change the tempo, redesign the package, so we used a cardboard can-conveyor, as it was called, which held the two cans side by side. It was just another packaging method to continue to market the same sale item.

I don't believe there are any of those can-conveyor items here.

Q. There are none of those in court?

A. No.

Q. Mr. Hyun, at any time, to your knowledge, did the defendant, Oriental Foods, ever use any of the plaintiffs' labels as a basis for the design of any label by Oriental Foods? A. Absolutely not.

Q. To your knowledge, did Oriental Foods ever copy [396] any labels of the plaintiffs?

A. No.

Mr. Harris: You may cross examine.

Cross Examination

Q. (By Mr. Lewis E. Lyon): You stated that

(Testimony of Jaisohn Hyun.)

you discontinued taping cans in 1950, and thereafter put the cans together with a cardboard carrier. I hand you what appears to be such a cardboard carrier, and ask you if that is it?

A. Yes.

Mr. Lewis E. Lyon: I will ask that this be marked in evidence as plaintiffs' exhibit next in order.

The Court: It may be received.

The Clerk: Just a minute. Double can of beef chop suey and chow mein noodles, Jan-U-Wine label, identified as Plaintiffs' Exhibit 53. Are these offered in evidence?

Mr. Lewis E. Lyon: We offer those in evidence.

The Court: It may be received.

(The items referred to were marked Plaintiffs' Exhibit 53, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): How long did you continue the one cent sale packaging as illustrated by Exhibit 53? A. Approximately three years.

Q. From when to when? [397]

A. Somewhere in the beginning of 1950 we started, and we continued, I believe, into the year some time of 1954.

Q. How much more does it cost to put this cardboard tie-around with cans than it does to put a piece of tape around the cans?

A. I don't know.

Q. It is considerably more, is it not?

A. I believe it is less.

Q. You have testified on the taking of your

(Testimony of Jaisohn Hyun.)

deposition that it cost considerably more, did you not?

Mr. Harris: That is objected to, if the court please.

The Witness: I don't know. I don't know exactly. I don't know.

The Court: When you are seeking to impeach him by a specific statement, you have a right to refer to the deposition, so that we will know what you are referring to.

Mr. Lewis E. Lyon: Yes, I will do that, your Honor.

Q. You have no knowledge now of the cost of this cardboard carton, as used on Exhibit 53?

A. No, I don't. I tried to anticipate why we did change, and for what valid reasons, and one would probably have been cost of packaging material, and one might have been cost of labor, direct labor, and I don't know.

Q. When you put it in this cardboard carton, like Exhibit 53—and we will hold the rest for just a moment—there [398] is nothing to prevent the merchant from taking the two cans apart, and selling them separately, without damaging either cans, is there, or the labels on either can?

A. No, there is no positive way.

Q. The merchant could strip those two cans of Exhibit 53 from the cardboard container and sell them separately, couldn't he?

A. He could this one, because our one cent sale banner is not across the face of it. This would be

(Testimony of Jaisohn Hyun.)

a regular item in the line, so he could sell that separately.

The Court: I thought you said a while ago that is one of the reasons why you made the labels go over the tape—no, under the tape—was it over or under?

The Witness: Over.

The Court: Over the tape?

The Witness: No, the tape over the labels.

The Court: The tape over the labels?

The Witness: Yes, sir.

The Court: So that if he took it off,—

The Witness: He would tear it.

The Court: —he would tear it, yes.

The Witness: Yes.

Mr. Lewis E. Lyon: I want to place before you your deposition,—

The Witness: Your Honor, in addition to that, that is [399] also why we overprinted the message "1c Sale," so that they could not sell that item as a regular standard item at the regular standard price.

The Court: You had to protect yourself against your customers or distributors; isn't that true?

The Witness: Even if the grocer was able to separate them, which in some cases he did, he would definitely have a special promotional item, for which he couldn't get the regular price.

The Court: I see.

Q. (By Mr. Lewis E. Lyon): Exhibit 53, as I understand it, shows the way that you sold this

(Testimony of Jaisohn Hyun.)

one cent sale item for three years; isn't that correct? A. Approximately.

Q. Now, I am going to ask you to look at your deposition, taken November 10, 1955, before Rodney A. McKeever, notary public, in Los Angeles, and refer you to page 100 thereof, and will ask you to read that.

The Court: Counsel will probably stipulate that he made those answers. Counsel will probably agree that you may read any of that, and that he so testified.

Mr. Harris: We stipulate he so testified, and that he may read it.

The Court: All right. Go ahead.

Mr. Lewis E. Lyon: The testimony is: [400]

"A. The cans were side by side, held together by cardboard, called a can conveyor.

"Q. How long did you continue to use them in such cartons?

"A. Approximately a year or two years.

"Q. In 1951 or 1952 you went back to taping, is that correct? "A. I presume so, yes.

"Q. Why did you go back to taping?

"A. Taping was more economical.

"Q. I beg your pardon?

"A. The taping was more economical.

"Q. By that do you mean it was cheaper to pack them by taping them than to pack them by putting them in cardboard cartons?

"A. Yes."

You so testified. It is stipulated you so testified.

(Testimony of Jaisohn Hyun.)

The Court: All right. Here is the original of that, if you want to look at it. I am just putting that in front of the witness in case he wants to look at it.

Q. (By Mr. Lewis E. Lyon): Is there anything in these so-called invoices, Exhibits——

The Clerk: The invoices are AE-1 and AE-2.

Q. (By Mr. Lewis E. Lyon): ——AE-1 and AE-2, which shows on their face whether or not the cans were taped [401] together, as illustrated by Exhibit 13, or were held together by cartons as shown by Exhibit 53?

A. No, it doesn't say. However, it could not have been the cartons because we did not have them at that date.

Q. You had for many years in the past been putting out your products in cartons, both in vertical pairs and in horizontal pairs, as shown by Exhibits 2 and 4 to your deposition taken on November 10, 1955, had you not? A. Yes.

Mr. Lewis E. Lyon: All right. Now, I will ask that these be marked as exhibits next in order, the exhibits I just referred to,—Exhibit 2 to the deposition of Mr. Hyun of November 10, 1955, as Exhibit——

The Clerk: That is, the horizontal dual pack is marked Plaintiffs' Exhibit 54, for identification. The vertical pack, which heretofore was marked as Exhibit 4 to the defendant's deposition, is now marked as Plaintiffs' Exhibit No. 55.

(Testimony of Jaisohn Hyun.)

(The items referred to were marked Plaintiffs' Exhibits 54 and 55, for identification.)

Q. (By Mr. Lewis E. Lyon): When did you discontinue packing two cans together, as shown in Exhibits 54 and 55?

A. Either this year or last year; in 1954 or 1955.

Q. So that throughout the period of time from 1949 to date you had cartons for putting two cans together both [402] horizontally and vertically for a combination sale, did you not? A. Yes.

Q. Now, is it true throughout these periods of time that you also had a sticker separate from the labels, which you pasted across the combination, to show a one cent sale?

A. Yes, we had been using stickers since the '30s.

Q. To show a one cent sale?

A. To show a special promotion, a coupon, or a sale, or whatever it might be; even to further describe the product.

Mr. Lewis E. Lyon: That is all at the present time, your Honor. I don't desire to take a lot more of the court's time in cross examination of this witness. I believe the rest of it is covered by the deposition, which at the *proper* I will offer. It is not proper at this time.

The Court: All right.

The Clerk: Mr. Lyon, do you want to offer these Exhibits 54 and 55 into evidence?

(Testimony of Jaisohn Hyun.)

Mr. Lewis E. Lyon: Yes, I will.

The Court: They may be received.

The Clerk: Plaintiffs' Exhibits 54 and 55 in evidence.

(The items heretofore marked Plaintiffs' Exhibits 54 and 55, were received in evidence.)

The Court: Any redirect? [403]

Mr. Harris: Just a couple of questions, your Honor, and I will finish with him very quickly.

Redirect Examination

Q. (By Mr. Harris): Mr. Hyun, referring to Exhibit 53, were these products included in that exhibit always sold together as a one cent deal?

A. No, without any demarcation, these would be two separate standard items.

Q. But when you sold them joined together by such a carton, were they always a one cent deal, so to speak?

A. No, they weren't.

Q. That is my question. There is some confusion.

A. No, we had combination packages, one cent sale deals, combination deals, 2-in-1 combination deals. We have had all sorts of the combination of two or three items together.

Q. Were those sold—for example, Exhibit 54, was that product sold 3-in-1, for the price of just two plus one, or one plus two, or how was that sold? Was that a combination deal?

A. This is a combination deal which usually went on special.

Q. By that, what do you mean?

(Testimony of Jaisohn Hyun.)

A. At a special price. Of course, it was never as [404] economical as a one cent sale, but there was a slight reduction in the reflection of the retailer's cost for the second item.

Q. It was economical to whom?

A. First of all, to the grocer, and, secondly, to the consumer. Ultimately, we wanted to reach the consumer. In fact, there was no charge for the third item, which was a bottle of sauce, a bottle of soy sauce.

Q. What about Exhibit 55? Was that a one cent sale deal?

A. This was a combination. We called this a combination deal, combining the two units together in a package.

Q. But were they sold two units for the price of one, plus a cent? A. No, they were not.

Q. What was the price differential on anything of that kind?

A. There, again, we always had a slight reduction on either one or the other time. Most generally, the second item. I refer to the second item as the chow mein noodles. It is the less expensive of the two items.

Q. How long have you been merchandising oriental foods in combination deals, as you have explained them?

A. Since about 1935. I can verify that.

The Court: All right.

Mr. Harris: I think the witness is verifying something, [405] if the court please.

(Testimony of Jaisohn Hyun.)

The Court: Oh, I didn't follow that.

The Witness: We have had combination deals since at least November of 1938 on a printed price list.

Q. (By Mr. Harris): As shown by what?

A. On a printed sales order pad, which prints "Combination Deal, 12—15½ meat chop suey; 12—3-ounce chow mein egg noodles." Then there is a special federal inspected combination deal in 1938.

Mr. Harris: That is all, if the court please.

Mr. Lewis E. Lyon: That is all at the present.

The Court: All right. Step down.

(Witness excused.)

Mr. Harris: The defendant rests.

Mr. Lewis E. Lyon: At this time, your Honor, I will offer in evidence the deposition of the witness, Jaisohn Hyun, taken on November 10, 1955, as the plaintiffs' exhibit next in order, which is No. 56.

The Court: It may be received.

The Clerk: 56 in evidence.

(The deposition referred to was marked Plaintiffs' Exhibit 56, and received in evidence.) [406]

* * * * *

JAMES EDWARD BINGHAM

called as a witness on behalf of the plaintiffs in rebuttal, having been previously duly sworn, testified further as follows:

(Testimony of James Edward Bingham.)

Direct Examination

Q. (By Mr. Lewis E. Lyon): You have already been sworn, I believe. A. Yes, sir.

Q. I am placing before you Exhibits A, B, C, and D, and will ask you if you are familiar with the situs of these pictures. A. Yes, I am.

Q. Where were they taken?

A. They were taken in our plant in West Duluth.

Q. And you moved into that plant, I believe the testimony was, some time in the latter part of August, or the first part of September, 1951; is that correct? A. That's right. [408]

Q. Is there anything in these pictures, Exhibits A, B, C and D, which enables you to fix the date when the pictures were taken?

A. Yes, there is.

Q. What?

A. On the picture marked "B" there is one can that the code can be deciphered.

Q. And from that code you have determined that picture to have been taken when?

A. Early '52.

Q. Is there anything else in these pictures which enables you to determine when the pictures were taken?

A. Yes, there is a wall in photo "C."

Q. What wall is that?

A. That is a paneled wall that was installed in early 1952.

Q. You had that wall installed, did you?

(Testimony of James Edward Bingham.)

A. Yes, sir.

Q. Now, is there anything else in these photographs, Exhibits A, B, C and D, which enables you to determine the date when the pictures were taken?

A. Yes, sir. In photos "A" and "B," the power conveyor was installed at that time.

Q. When was that power conveyor installed?

A. Early '52. It could have been just the last month [409] of '51, or so, but I believe it was '52.

Q. How do you determine from the code mark on one of the cans the date?

A. Well, we have an embossing system, and we use letters and numbers. Every day the code is changed, so that we can tell from day to day when that can was packed.

Q. You say that is in one of these exhibits. Which one was that?

A. Exhibit B.

Q. That you were able to read the code number on some of the cans, or on one of the cans?

A. One of the cans.

Q. Which one is that?

A. One in particular. Let me see.

Q. Let the record show the witness is using a magnifying glass.

A. It is the case on the right hand of the first woman operator.

Q. You mean under the right hand?

A. That is right, under the right arm.

Q. And that code shows that can to have been packed on a particular day, does it?

(Testimony of James Edward Bingham.)

A. Yes.

Q. Or during a particular period of time?

A. Yes, sir. [410]

Q. And what was that particular period of time?

A. I can not distinguish the day, but the month is there, and the month is April.

Q. So the first April that you were in this new plant of the Chun King Company was when?

A. April of '52.

Q. With relation to the time of the canning, that is, of sealing the cans with the code mark on the can, when are the cans labeled and secured together by the taping operation?

A. Well, the cans could be labeled anywhere from the same day to two or three months later.

Q. So that this photograph could have been taken, in your estimation, at any time after April of 1952; is that correct?

A. That is right. [411]

* * * * *

Q. (By Mr. Lewis E. Lyon): Mr. Bingham, I am placing before you Exhibits 21-A and 21-D, or, 21-D alone, and in that photograph I will call your attention to the roller which is marked roller "A" on Exhibit 21-C. Did you see that machine that is in that photograph?

A. Yes, I did.

Q. Did you have a chance to examine it thoroughly?

A. I examined it, yes.

Q. Here in the courtroom?

A. Yes, sir.

(Testimony of James Edward Bingham.)

Q. Did you ever see a machine before that with a roller like the roller "A" on it? [412]

A. No, sir, I did not.

Q. You endeavored to operate the machine here in court, did you?

A. No, sir, I did not operate it.

Q. You turned it over,—endeavored to turn it by hand?

A. That is right. [413]

* * * * *

JENO FRANCISCO PAULUCCI

called as a witness on behalf of the plaintiffs in rebuttal, having been previously duly sworn, testified further as follows:

The Clerk: Mr. Paulucci has already been sworn.

Direct Examination

Q. (By Mr. Lewis E. Lyon): Mr. Paulucci, you have already testified in this matter concerning the attempt of the Minnesota Mining & Manufacturing Company to produce a machine, and there has been certain evidence with respect thereto on the defendant's case. Do you know when all efforts were discontinued in your plant for the Minnesota Mining & Manufacturing Company to produce for you a practical workable machine?

A. Yes, approximately.

Q. Is that shown by any memorandum which you wrote?

A. Yes, I wrote a memorandum, an interoffice memorandum, a copy of which I sent to Mr. Cronin of Minnesota Mining.

(Testimony of Jeno Francisco Paulucci.)

Mr. Lewis E. Lyon: I will ask that this letter be marked.

The Clerk: Letter, dated March 27, 1952, from Mr. Paulucci to Mr. Bingham, is marked Plaintiffs' Exhibit 57, for identification. [416]

(The document referred to was marked Plaintiffs' Exhibit 57, for identification.)

Mr. Harris: May we see it, counsel?

(The document was handed to counsel.)

Q. (By Mr. Lewis E. Lyon): I place before you Exhibit 57, for identification, and ask you if you can identify the same? A. Yes, sir.

Q. What is this?

A. It is an interoffice memo to Jim Bingham and to Leslie Eskola of the firm. Shall I read it?

Q. No. Does it show that a copy was sent to anyone else?

A. Yes, sir, with a copy to Mr. G. C. Cronin of Minnesota Mining & Manufacturing Company.

Q. Was that interoffice communication and copy sent out by you upon the date it bears?

A. Yes, sir.

Q. In the ordinary course of your business?

A. Yes, sir.

Mr. Lewis E. Lyon: I will offer this paper, Exhibit 57, for identification, in evidence as Exhibit 57.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 57 admitted in evidence.

Mr. Lewis E. Lyon: That is all. [417]

* * * * *

The Court: Then I will hear any argument you desire to present.

The Clerk: Do you need any exhibits?

Mr. Lewis E. Lyon: Not immediately.

* * * * *

Mr. Lewis E. Lyon: The issues of this case are clearly before the court, and they involve a question of infringement of claim 1, the method claim of the Paulucci patent No. 2,679,281 by the defendant Oriental Foods, particularly, in that machine produced for Oriental Foods and placed in operation by Minnesota Mining & Manufacturing Company, and which is used to tape [426] two cans together in end-to-end relation, and which clearly shows in its operation the method as defined in the method claim 1 of the Paulucci patent.

It was clearly demonstrated to the court that the method is a method of securing two cans together, the two cans having at their adjacent ends beads or flanges, as is true of the sample which I have in my hand, and which is Exhibit 25, wherein there are two flanges in the two alined cans, alined in end-to-end relation, and which are to be secured together at those beads or flanges. And the method which that machine employed is the method of stretching the tape over those beads by rotating the cans while there is a full tension applied to the tape in a direction substantially tangent to the cans at the point of application of the tape, so that the tape passes around the beads and against the side walls of the cans on opposite sides of the beads.

Now, the important factor in that is as illustrated in Figures 2 and 5 of the Paulucci patent, because Figure 5 illustrates the mere setting against those beads of a portion of the tape, and Figure 2 illustrates what happens when that tape is stretched to cause the tape to closely follow the contour of the beads, and to adhere to the side walls of the cans; and a point which perhaps needs illustration here is the fact, which is apparent from a comparison of Figures 2 and 5, and that is that the tape is stretched at one point, and [427] that is the central portion of the tape, where the tape has to be stretched so that it will pass around and lie closely against the contour of the beads of the can.

A sample of the tape so stretched will show, as the one which I have in my hand, that there is no stretching of the tape at its edges on the opposite sides of the beads, but that the tape is actually stretched so that it is permanently deformed in its central portion, so that it passes completely around the beads, allowing the tape at the sides to adhere to the sides of the can.

That is a very important factor, and is the factor of the invention in this case, and that is the applying of that quantum of tension to the tape as the cans are rolled, and in a direction of following the tangent at the point of application of the tape, so that that tape in that center portion is stretched and permanently deformed, so that it will adhere to the beads of the can, and do what the inventor, Mr. Paulucci, stated, in effect weld the two cans permanently together by that simple method.

Now, that the defendant in its operation actually employs that method is obvious. It is obvious from a consideration of the photographs of the machine, Exhibits 21-A to 21-G, inclusive, and is further evident from the charts, Exhibits 1 to 5—I mean, Figures 1 to 5, which are Exhibits X, X-1, X-2, X-3 and X-4 of the defendant's exhibits, because those [428] exhibits show, particularly as was admitted by the witness on the stand, in their latter Figures 4 and 5 that tension was applied in that direction stated, so as to actually stretch the tape to cause the same to adhere around the beads of the can and over the side walls precisely in the manner as defined in the patent in suit.

Now, the difference, if any, lies in the use in this machine, which was not true in any machine produced by Minnesota Mining & Manufacturing Company before, as is shown by the evidence, of the so-called pre-stripping roller. If we look at the photograph, Exhibit 21-C, particularly, we will see how exaggerated—and it is exaggerated, and not that I contend that it is not correctly so, for we often exaggerate in drawings for the purpose of making a clear illustration, as to the amount of so-called free loop, which is shown, for example, in Figures 1 and 2, Exhibits X and X-1. The purpose of that free loop is obvious.

The machine starts in high speed, so you put a little freedom on the tape, so that when the tape starts at its high speed there isn't a complete snap on the tape, which otherwise would break the tape. So you put a slight loop in it to let the machine

start and get in operation, and then the operation of rolling the cans against the tape, passing in that circuitous route, causes that tape to be stretched around the beads, and the stretch is in precisely the direction [429] specified in the patent in suit, and for the purpose of causing the cans to be welded together.

The machine was out of adjustment here in its operation in court, and, certainly, if it operated the way it did here in court, no one would ever complain about its being used. And its manner of operation is illustrated by Exhibit 22, which, incidentally, is a very interesting exhibit, because it also demonstrates the problem which existed in this art, and which was first solved by Paulucci, and is shown in the patent in suit, because it demonstrates precisely the difficulty that Mr. Paulucci testified that he had in trying to do this until he came upon this particular method of applying tension; and that is, it demonstrates the effort to secure two cans together where tension was not used sufficiently to perform the results of the Paulucci patent. And it demonstrates what has been referred to in this case, and talked of by many witnesses, as the curling of the tape on the sides of the two beads, and that curling or ruffling is interesting.

Why? Because it demonstrates the fact that because of the failure of the tape to be stretched and deformed at its center, there is a greater quantity of tape on the two sides of the bead that will permit that tape to lie down on the can's sides and

adhere to the can at that point. As testified to by the operating plant manager of the defendant's organization, [430] the taping operation of this sample which was endeavored to be run through the machine that was here in court, and as shown by Exhibit 22, was an unsatisfactory operation.

I do not desire at this time, your Honor, to burden this court with a discussion of the large group of prior patents which were offered by the defendant without explanation, and without having pointed out to this court in any way as to what the defendant considered to be its best reference, but I think that perhaps it would be better for me to refrain from discussing those patents at the present time, until I did know something of the defendant's position.

The Court: I think that, of course, is all right, and when it comes to testimony, I sometimes say to counsel, if you have an expert, for instance, not to touch on the prior art or the anticipatory art until counsel has commented. But in view of the fact that you have the opening and closing, it would call for a zigzagging of discussion, so if you will give me your reaction to the references, it would be better. I am not interested in any except those that are not before the Patent Office. I am satisfied that they reached the proper conclusion upon the prior art.

As you all know, gentlemen, I am a believer in the patent system, and you will find that when I have been reversed by the higher court in a patent case, it has always been because I have said that a thing

is valid, and they have said it was [431] not, indicating that I am willing to see invention in simple things, where they may be carried away by that very unfortunate phrase of Mr. Justice Douglas, that only a spark of genius is invention. If that is true, God help us, because then some of our most valuable inventions, including the zipper, would never have been sustained.

* * * * *

I am making this statement so that you will understand that so far as I am concerned, while I am willing to correct an error, a palpable error, or a gross error of the Patent [432] Office, I am not going to re-argue whether they were right or wrong in claiming a distinction in the patent in suit from the references which are in the file wrapper. That does not mean to say that you cannot use the file wrapper.

Incidentally, the file wrapper was not introduced, was it? There was some reference to the file wrapper, but I don't remember that it was introduced.

The Clerk: It was introduced, your Honor.

The Court: I beg pardon?

The Court: The file wrapper was introduced as Exhibit E.

The Court: Was it?

Mr. Harris: Yes.

The Court: Then evidently that is something I slipped up on. I didn't remember it.

Mr. Lewis E. Lyon: It is in evidence, your Honor.

The Court: Evidently, I got interested in some-

thing else, because I did not look at it. But that is all right. I will study it further.

However, you cannot use the file wrapper to limit the scope of the invention. For instance, I have referred to the Joyce patent, in which the file wrapper was used very effectively to show that the claim was narrow, and that what Mr. Joyce was trying to do was to recapture something that was either abandoned or denied to him in the proceedings before the Patent Office. [433]

So, to get back to the proposition, you are entitled to the prima facie presumption that when they said that this is invention over Loskamp, Nichols, Glidden, Blum, Howard, Thomson, Kellgren, Swartz and Bergstein, you are entitled to the prima facie presumption that they were correct.

So for the present, at least, you may, if you want to, refer to them generally, but I am more interested in the five patents in the prior art, Ruttan, Nifong, Roehrl, Ewart and Johnson, which are offered as anticipatory, and which were not among the references given by the Patent Office.

Then, of course, you will have the reply, and we will see what counsel says, and I will tell you, when your turn comes, whether I desire any comment on the others.

Mr. Lewis E. Lyon: Your Honor, I am certainly in full accord with this court's position with respect to the patent law, and how that patent law should be construed, and as far as the flash of genius doctrine is concerned, unfortunately set forth in the Supreme Court's decision referred to, that is

a manner of approach to the question of patentability or invention that has been dealt out, in my opinion, in the patent law, in the 1953 Patent Act, where Congress wrote into the new law a statement that it is immaterial, in construing a patent, as to the method in which the invention was derived, and in session has particularly stated that they made that amendment to the patent law to set aside the doctrine of flash [434] of genius, announced by the Supreme Court in the case referred to.

I believe firmly in the patent system. I believe that our reason for advancement in this country, or one of the reasons, beyond that of other countries on the face of the earth, has been our willingness to give to those people who have spent their time to advance this country, the reward to which they are entitled.

In this case it is the plaintiffs' position that there existed no practical method of securing cans in end-to-end relation prior to Paulucci's invention, and, particularly, there was no practical or successful invention existing of securing cans together in end-to-end relation through the use of a plastic tape prior to Paulucci's invention. [435]

* * * * *

Now, the machine that was offered here in court, and which does work,—at least, it works to produce the stretched tape operation, as the defendant is using it in the producing of its taped samples as shown by Exhibits 25, 9-A, 10-A, and so forth throughout this record, is not the machine of the Johnson patent.

It is not the machine of the Johnson patent because it was testified before this court by the witnesses testifying [436] with respect to the machine which they used, that they had to have, in order to have the machine work, this so-called pre-stripping roller, which is the roller shown in Exhibits X to X-4, inclusive, which pulls out this starting piece of tape, so that the machine will operate. The witnesses testified that that pre-stripping roller was necessary, a necessary part of the operation of that machine, and that the machine would not operate without it.

The Johnson patent does not have any such stripping roller in it, or pre-stripping roller in it. The Johnson patent further fails entirely, in that it does not have a means in that device, including a spring or spring operated clutch or ratchet mechanism for determining the amount of tension required in order to perform properly this taping operation. That that tension is an absolute essential to the successful carrying out of this operation could be no more firmly proven than by the fact and testimony of the witnesses here in court that the machine shown in the photographs Exhibits 21-A to -G, inclusive, did not work because it was out of adjustment when it was here in court. And how was it out of adjustment? It was out of adjustment in determining correctly the amount of tension required to be placed upon the tape in order to stretch the center portion of the tape so that it will pass around the beads, and it does not do that, as shown here in court, as shown in Exhibit 22.

But it does do it when it is [437] correctly adjusted, as shown by the other exhibits, where the operation is shown to have been successfully performed.

There could be no question but what a machine can be produced, and which will operate to unsuccessfully apply tape, and which does not infringe the Paulucci patent, because it does not perform the operation in accordance with claim 1 thereof, of putting that amount of tension thereon to stretch the tape around the beads.

Now, there is absolutely no suggestion in the Johnson patent, and in the entire specification, of any requirement for tension—not a word—and the Johnson patent that I am referring to and have been referring to here is the Johnson patent No. 2,652,166, which is Exhibit S. [438]

* * * * *

The next patent of the five is the Nifong patent. That patent is Exhibit K. The Ruttan patent was Exhibit G. Again, there is not a thing in the Nifong patent, not a word throughout its entire description, of putting tension upon a pressure sensitive adhesive in a packaging operation in order to stretch a portion of that pressure sensitive adhesive tape to cause that tape to pass around an irregular contour, so that you will get, in effect, the welding set forth in the Paulucci patent, and as stated by Mr. Paulucci. It is absolutely silent upon any such method of operation. [439]

* * * * *

There is no way of telling. In fact, you could not tell today from Exhibit 22 whether that Exhibit 22

would stay together in the market, or whether it would be subject to the objection, which the evidence shows, of coming apart, so that the salesmen, like of the plaintiffs', would have to go around with a pocketfull of tape to the stores and rehook the cans together. [442]

* * * * *

We start out with the defendant manufacturing and selling a product, as shown by Exhibits 54 and 55, that is, products set up as combination [446] dinners in cartons, and that the plaintiff brought out and placed upon the market a one cent sale item as illustrated by Exhibit 11.

Now, it is not the plaintiff's position that the plaintiff has any exclusive right to a combination sale or to a one cent sale item. One cent sales have been going on as long as I can remember, and that is of selling two items for the price of one, plus one cent. That is not the position.

The defendant then brought out a one cent sale. I was wrong on Exhibit 11, because that is not the one cent sale can. I meant Exhibit 44 is the one cent sale item of the plaintiffs, and the one cent sale item of the defendant is illustrated by Exhibit 13.

Now, so far as those two items are concerned, I do not believe personally that there is any possibility of a normal prudent purchaser, exercising ordinary care, confusing one of those products for the other. And that is as far as Exhibits 13 and 44 are concerned. The business was carried on in that way. [447]

* * * * *

Mr. Lewis E. Lyon: And my point is that no one

has a right to a particular color. That is the law. The proposition that I state here, however, is not that we have a proposition of a color, but we have a distinct copying of a color combination, or color combinations, for the purpose, and for one purpose only. I submit that if you were familiar with the purchasing of these three products of the plaintiffs, and you walked into a store and you saw these three other products on the stand, that even as a prudent purchaser you would be apt to pick up this product in mistake for that one.

In fact, I have had a hard time keeping them separated here.

The Court: While, of course, it is not necessary that actual confusion of source be shown, there is no evidence in the record of actual confusion of source.

Mr. Lewis E. Lyon: No, your Honor, and it is not necessary, according to the cases. [451]

* * * * *

Mr. Harris: As to apparatus claims 2 and 3, the plaintiffs have conceded that they are not infringed. Therefore, the issue of infringement is not before the court.

The Court: Are you talking about——

Mr. Harris: I am talking about apparatus claims 2 and 3, your Honor. The only issue as to those claims is as to their validity. And just to complete——

The Court: I don't see how claims 2 and 3 are before the court at all, if they are not urging their infringement. You are not entitled to a declaration of infringement unless you admit that you are following it. In other words, when, because of your sug-

gestion in your memorandum, I asked the plaintiffs to limit themselves to claim 1, then you cannot broaden it by keeping claims 2 and 3 in the case, because you are not entitled to a declaration where they are not claiming it. There must be a claim. If they are not claiming that you are infringing, you are not entitled to bring them into court and have them litigate with you an abstract proposition.

Mr. Harris: Of course, your Honor, we filed a counterclaim for a declaratory judgment. [467]

The Court: I know, but that does not make any difference. You remember, it took us a long time to get the Supreme Court to even concede that you could determine validity, even though you found non-infringement.

The Supreme Court finally said we could do it. In fact, the Supreme Court has said specifically that a declaratory judgment has not broadened jurisdiction, and when they bring into court one claim, you cannot say, "All right, you brought in one claim, I will bring in Claim 2," unless you charge yourself with infringement. You remember, in one of the earliest cases in which I wrote an opinion many years ago, the Ballard case, I pointed to the fact that a person cannot have a declaration of invalidity unless he charges himself with some act of infringement. Otherwise the matter is not before the court.

Mr. Harris: Well, we certainly do not charge ourselves with any infringement.

The Court: All right. Then you have no right to bring that in. Then you should have insisted—I will not say you should have insisted, because I would

have asked that question anyway, because I know of those cases, but you cannot by a counter-claim ask me to determine an abstract proposition. There must be a dispute. I have written probably more on declaratory judgment than anyone in this community, anyway. Long before it was put into the federal system, I advocated [468] it and wrote on it, when it was a part of California law, and later on, after it was put into the system, at the request of Presiding Judge Wilbur, I gave a lecture on declaratory judgment. I wrote several opinions which were commented on by the late Professor Borchard in his book, and the sine qua non of the right of a court to make a declaration is there must be a dispute between the parties.

Now, if they are not charging you with infringing claims 2 and 3, there can be no dispute, and I cannot take any jurisdiction under the counter-claim because the counter-claim does not arise out of any transaction. They have limited themselves to claim 1, so this lawsuit must be determined on that basis.

You could not bring an individual action just to declare those two invalid unless they charged you with infringement. They are not charging you with infringement.

Mr. Harris: They have in the past, your Honor.

The Court: That does not make any difference.

* * * * *

The Court: Let me ask you one question: You made a remark to the effect that there is no stretching of the tape [469] either before or after.

As I read the claim, and I have marked it up the

way you did, and I have split it into the four elements, and marked them 1, 2, 3 and 4,—the first one is alinement. The point you have referred to is that it is not a part of your method or process. I like your word “method” better than “process”, because “process” is used more in a chemical sense, in combining things.

The second element is stretching.

The third element is not stretching, it is pulling.

Mr. Harris: It is pulling to put the tape in a stretched condition. It is pulling to stretch. It says so.

The Court: No, it says, “pulling on the portion of said tape not secured to said can in a direction substantially tangential to the periphery of the cans to place same in a stretched condition.”

Mr. Harris: That is my point. It is a stretched condition. The third point is stretching also, to pull the tape to a point where it stretches. Then the last element, of course, is rotating while the tape is so stretched.

The Court: Well, your operation includes alinement of the cans. Otherwise, you could not tape them.

Mr. Harris: Certainly, we aline the cans.

The Court: It includes rotation.

Mr. Harris: It includes rotation. [470]

The Court: You rotate them, because otherwise you would not get the benefit of the machine operation. You would have like a mechanical operation, where you would be turning and covering at the same time.

Mr. Harris: That is right, your Honor. We do that.

The Court: I am trying to understand your contentions.

Mr. Harris: Yes, your Honor.

The Court: So the only elements you claim are not in your operations are 3 and 4; is that it?

Mr. Harris: 3 and 4.

The Court: Or 2 and 3?

Mr. Harris: 2 and 3, your Honor, yes.

The Court: 2 and 3, the stretching and the pulling.

Mr. Harris: Of course, even in element 4, we say that there is no evidence that we rotate the cans while the tape is stretched. In our machine these buffing rollers press the tape down onto the cans. So even in element 4 we don't practice the method of the patent in suit.

The Court: All right. [471]

* * * * *

Mr. Harris: Now, going back to the matter of claim 1 of the patent in suit, we suggest, if the court please, that this claim is purely invalid for several reasons. As has been indicated, both the plaintiffs and the defendant were hand taping cans as early as 1949, which is almost three years prior to the filing of the application for this patent in suit.

The evidence shows that in that hand operation by both the plaintiffs and the defendant, they put the tape on the cans, they pulled the tape tight, and rotated the cans, holding the tape under tension to make the tape go on there tight. Both the plaintiffs and the defendant did that. [472]

The only difference that Mr. Paulucci could point out between what he had been doing prior to August 1951, and what he did subsequent to that date, that being the date when he says he invented this method, was that after August of 1951 they used more tension in applying the tape to the cans.

The Court: It is a principle of patent law that the substitution of a mechanical action to a manual operation is permissible, and does not fall within the doctrine of equivalence.

Mr. Harris: That is true, your Honor, but my point is this: My point is that the only difference between what Mr. Paulucci was doing before he made the alleged invention and after the invention was that he was pulling the tape tighter.

The Court: But that little difference may spell invention.

Mr. Lewis E. Lyon: Right. [473]

* * * * *

Mr. Harris: My point here, if the court please, was simply that claim 1 is invalid because if this matter of tension is important, as the plaintiff says it is, then the claim fails to say how much tension. There is no statement as to how much tension must be applied to accomplish the desired results. That was the point there.

Then in going on to this matter of tension, further, I call the court's attention to the Nifong patent, No. 2,120,504, which is Defendant's Exhibit K, which is very pertinent to this inquiry we have here.

This Nifong patent covers a can banding machine,

as the [477] witnesses have called the machine of this type involved here, a machine for applying resilient cellophane, sticky cellophane tape to cans, and it has these elements, this machine:

First of all, as shown in the drawings, it applies to tobacco cans, as shown in Figure 11 of the patent.

The Court: It is quite an elaborate piece of machinery, the Nifong patent.

Mr. Harris: It is an elaborate piece of machinery, but the essence of it is very simple, your Honor, and I would like to speak briefly to it, because it is of importance here.

The Court: What figure are you referring to? There are so many in that patent.

Mr. Harris: Figure 11. Take sheet 6 of the drawings of the patent, if the court please.

The Court: Yes, it is a very elaborate patent.

Mr. Harris: There in Figure 11 on sheet 6 your Honor will see the tobacco cans at the bottom dotted in. The patent also says, of course, that we may use this machine to tape round cans instead of odd shaped cans like shown here.

Then in the upper figure, Figure 10, it shows the line of tape going around the tortuous path around these rollers, and finally being made into a loop around the cans. But the point is that this patent was a machine whereby the can is supported on its end, the tape was tacked down on the can automatically, then the can was rotated to pull the tape out [478] and apply it to the can. And the patent teaches very clearly the importance of applying

tension to that tape while you are taping the can to make it go on right.

That is referred to in several places in the patent. I would like to read, in particular, from page 6, column 2, lines 26 to 30, where the patent says:

“Particular attention is called to the fact that the tape 87 having the adhesive thereon is held taut at a substantially uniform tension during the entire revolution of the can, and this aids materially in the proper application of the tape.”

It puts the tape under tension, and a special mechanism is provided for in the patent to cover that. In fact, claim 51 of the patent, the Nifong patent, states in its last element, “effecting a retarding paying out action of the strip”—that is the tape—“during the winding action for placing the strip” or tape “under tension, and severing the strip.”

In other words, this Nifong patent teaches that if you want to tape a can, you apply the tape to the can, you rotate the can with the tape under tension, and that applies the tape to the can. And the intention and motive is implicit in this patent, and its whole disclosure and claims teach that.

The Court: But Nifong is a very elaborate patent, which covers the machine to achieve the results, as well as the [479] method.

Mr. Harris: The claims cover the method as well, your Honor.

The Court: Yes, I know, but it is an elaborate machine.

Of course, it is very easy at times, especially in

a combination patent—and we are dealing with a method patent—to find scattered somewhere here and there some of the elements. In fact, this is so common that we have a name for it now, a mosaic defense. In fact, I amused myself once in one of my opinions by trying to find who first used it. I had to go back early to somebody back in 12 Federal, who first used the expression. You can take several elements in a combination, and by taking them separately you can find that each of them may have been used somewhere else. The question ultimately, when you are dealing with a combination, is not whether each of them—I think I said that myself in one of the last opinions I wrote—it isn't so much a question of whether each of them separately can be found somewhere else. The question is whether anyone before had combined them in this manner, so that they achieve a result not achieved before.

Mr. Harris: Exactly, your Honor, and I would be the first to concede that this Nifong patent does not teach step 2 of the patent in suit, which is pre-stretching the tape before it is applied to the can.

However, if the plaintiff tries to expand claim 1 of the patent in suit to cover any taping by which he taped two cans together, by just putting tape on the cans, then this Nifong patent covers that exactly.

The Court: Of course, what he is claiming is the method described in that patent, and the four elements of it in combination. He is not waiving any, and he is not claiming that your process or

your method eliminates any of them, because there has been no statement about equivalence, because, if he were, he would have to argue that you have substituted something else that takes the place of what you dropped. He is claiming your process is identical because it involves the same elements.

Mr. Harris: And my point has been, of course, your Honor, that there is no proof that our apparatus, the method we use, does include those elements. But may I go on? [481]

* * * * *

Mr. Harris: Yes, your Honor. My next point as to the patent issues is that we suggest, if the court please, that claim 1, the method claim, is clearly invalid in view of this Johnson patent, which is Defendant's Exhibit S.

The witness Peterson, on cross examination by Mr. Lyon, [483] pointed out the complete identity between this Johnson patent and the mechanism that was set up at Chun King, and also the identity of this Johnson patent with the machine here in suit. The witness Johnson further showed the identity of the construction and operation of this Johnson patent, Exhibit S, to the construction and operation of the very machine that the defendant is using, and the similarities between the construction shown in this patent and its method of operation and that of the defendant's machine must be self-evident to the court, because you could almost take these drawings and lay them on the defendant's machine.

This has all the elements in the defendant's ma-

chine, and, in that connection, I point out that in Figure 7 of this Johnson patent it shows an idler roller, No. 122, which has just the same function as the idler roller in the defendant's machine, that is, the pre-stripping roller of the defendant's machine in which the tape is stripped off the reel or the roll first.

It also in that same figure has this ratchet, which is numbered 121, which is the full equivalent in every way of the ratchet and clutch in the defendant's machine.

This patent shows the very mechanism, as the court will remember, the very mechanism that was used in the original design in 1950 in the first prototype machine that was sent up to the Chun King Sales Company by the Minnesota Mining & [484] Manufacturing Company of Minneapolis, Minnesota.

At any rate, the testimony and the evidence shows that this patent shows substantially the same construction, and the same method of operation as that of the defendant's machine.

Now, either we say this patent invalidates the patent in suit, or the patent in suit is not infringed by the defendant's machine.

Things that are equal to the same thing are equal to each other. And if this is equal to the defendant's machine, and if the defendant's machine infringes the patent in suit, then this particular patent anticipates the patent in suit.

The Court: I cannot conceive that the Patent Office did not have cognizance of that patent, be-

cause they were pending at or about the same time.

Mr. Lewis E. Lyon: They were.

Mr. Harris: This patent was not cited in connection with it.

The Court: I know it wasn't cited, but they were pending. In the Paulucci patent, the application was filed May 14, 1952, and was granted May 25, 1954, which is about par on the course,—two years. The Johnson patent was filed May 29, 1950, and granted on September 15, 1953, so they overlapped each other there. For at least one year they were both pending.

Mr. Harris: We suggest, if the court please, that this [485] patent and the Nifong patent, being very close to the patent in suit,—

The Court: Coming close does not solve the problem, if there is a little bit of difference.

Mr. Harris: There is a little difference, your Honor, and I suggest to the court that in the Johnson patent, as in the defendant's machine, there is no preliminary stretching of the tape before it is applied to the cans.

The Court: On the Johnson patent the emphasis is on the pivoted arm.

Mr. Harris: Yes. In the Johnson patent there is no preliminary stretching of the tape, just as in the defendant's machine there is no preliminary stretching of the tape, which is element 2 of the patent in suit.

We say either we do not infringe the patent, or the patent is invalid in view of the Johnson

patent. That is the long and short of our argument on the Johnson patent.

The Court: All right. [486]

* * * * *

Mr. Lewis E. Lyon: Getting on to one other point, and I think that there is very little I need to touch upon that, and that is the question of the Nifong patent and the Johnson patent. As to the Johnson patent, if it was ever proved that the Minnesota Mining & Manufacturing Company did not have a [503] machine that would meet this problem, it is found in the letters and correspondence between the Minnesota Mining & Manufacturing Company and Chun King, and the Minnesota Mining & Manufacturing Company is the assignee of the Johnson patent in question.

Further than that, there is absolutely no mention in the Johnson patent of stretching the tape around the bead of a can, or of stretching it or of taking that degree of tension that is required to produce this new result testified to by Mr. Paulucci of actually welding the cans together. * * * * * [504]

[Endorsed]: Filed April 18, 1956.

[Endorsed]: No. 15104. United States Court of Appeals for the Ninth Circuit. Oriental Foods, Inc., a corporation, Appellant, vs. Chun King Sales, Inc., and Jeno F. Paulucci, Appellees. Chun King Sales, Inc., and Jeno F. Paulucci, Appellants, vs. Oriental Foods, Inc., a corporation, Appellee. Transcript of Record. Appeals from the United States District

Court for the Southern District of California, Central Division.

Filed: April 19, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 15104

CHUN KING SALES, INC., and JENO F.
PAULUCCI,

Appellants,

vs.

ORIENTAL FOODS, INC.,

Appellee.

CONCISE STATEMENT OF POINTS UPON
WHICH PLAINTIFFS-APPELLANTS IN-
TEND TO RELY UPON APPEAL AND
ASSIGNMENT OF ERRORS

1.

The judgment of the District Court errs in adjudging that defendant has not competed unfairly with plaintiffs. (Paragraph 4 of the Judgment.)

2.

The District Court erred in holding that prospective purchasers of defendant's merchandise are not likely to be confused with the products of plaintiffs because of the similarity in dress, label, color and

appearance of the defendant's product brought out in, after and in imitation of plaintiffs' products. (Finding of Fact 26).

3.

The District Court erred in holding that the labels of the defendant do not simulate in lettering, form, colors, picture, script and combination of words, the labels of plaintiffs. (Finding of Fact 28).

4.

The District Court erred in holding that by comparison of the "tout ensemble" the labels of the defendant are not confusingly similar to the labels of the plaintiffs. (Finding of Fact 29).

5.

The District Court erred in failing to give to plaintiffs relief for unfair competition, particularly in view of the Finding of the District Court that a casual buyer not buying by brand name would pick up one can for another. (Finding of Fact 30).

6.

The District Court erred in finding that a buyer who looked for Chun King brand cans would not be likely to pick up Jan-U-Wine brand cans. (Finding of Fact 31).

7.

The District Court erred in its Conclusion of Law that the defendant has not competed unfairly with plaintiffs and in its Conclusion of Law that the plaintiffs recover nothing by virtue of their second cause

of action for unfair competition. Conclusions of Law V. and VI.)

8.

The District Court erred in disregarding the indiscriminating prospective purchaser and in judging the plaintiffs' cause of action solely upon the basis of a comparison of the brand names without regard to the make up and combination of figures, script and coloring of the labels of plaintiffs and defendant.

9.

The District Court in its Memorandum in this action erred completely in holding that the law protects the defendant in the matter of its unfair competition because, broadly the defendant was the first on the market in the sale of Chinese-American type foods without regard to the showing that the defendant by plan followed precisely the change and changing of labels of the plaintiffs and brought out labels for its cans in precise duplication of the labels of plaintiffs, one following the other.

Dated: April 13, 1956.

LYON & LYON

/s/ By ROBERT DOUGLAS LYON

Attorneys for Plaintiffs-
Appellants

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 16, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL UNDER RULE 17(6) BY APPELLANT ORIENTAL FOODS, INC.

Defendant-appellant Oriental Foods, Inc., in accordance with Rule 17(6) of this Court, hereby provides its statement of points upon which it intends to rely on its appeal in the above-entitled action, as follows:

1.

Claim 1 of Paulucci patent No. 2,679,281 in suit is not infringed by defendant's method of joining together cans in end-to-end relationship.

2.

Said claim 1 is limited to a specific method, involving a series of steps, in a stated sequence, which includes the step of "stretching a portion of a slightly resilient sticky tape and applying said portion of said tape over portions of the abutting beads and adjacent side walls of said cans while said tape is in stretched condition to secure said cans together," followed by pulling on the end of the tape and rotating the cans, to tape the cans together.

3.

The method used by defendant, and held to constitute infringement of said claim 1, does not involve the step of said claim 1 above quoted.

4.

The record is devoid of any showing that the method claimed in said claim 1 has ever been used in the commercial practice of joining two cans together, even by the plaintiff in its own operations.

5.

The file history of Paulucci patent No. 2,679,281 shows an attempt by Paulucci to obtain allowance of a claim free from the limitation of the step above quoted, and the refusal by the Patent Office to allow such a claim. For this and other reasons, plaintiffs are estopped from receiving the benefit of any interpretation of said claim 1 which ignores the limitation of the above quoted step.

6.

More than one year prior to the date of filing of the application for patent No. 2,679,281 the plaintiff Chun King Sales, Inc. utilized in its commercial operations a method which completely anticipates the method claimed in said claim 1, if the above quoted step is ignored, and sold in the open market cans fastened together in end-to-end relationship by the utilization of said method. The use of a method in packaging goods for commercial sale more than one year prior to the filing date of a patent application stands as a one year public use bar thereagainst, as a matter of law.

7.

Any interpretation of said claim 1 which would

support a holding of infringement by defendant's use of its method would make the claim invalid by reason of a prior public use bar. It would make said claim directly readable upon the commercial practice of plaintiff Chun King Sales, Inc. and others more than a year before the Paulucci application was filed.

8.

The patentee Paulucci never made oath to being the first inventor of any method of taping together two cans in end-to-end relationship which did not include the limitation of claim 1 hereinabove quoted.

9.

Any interpretation of said claim which eliminates the limitation of the step above quoted renders said claim invalid by reason of anticipation by the prior art patents of record and for lack of invention.

10.

The taping together of cans in end-to-end relationship with the Dellenbarger machine, as employed by the defendant, does not constitute an infringement of claim 1 of patent No. 2,679,281, in suit.

11.

Claim 1 of the patent in suit lacks invention and is invalid over prior patents, prior publications and prior public use. The Patent Office was never advised about the prior public use.

12.

The District Court erred in failing and refusing

to make appropriate findings of fact, conclusions of law, and to render judgment as to the invalidity and lack of infringement of claims 2 and 3 of patent No. 2,679,281. A ruling thereon was required by the defendant's counterclaim.

13

The District Court erred in failing to hold claims 2 and 3 invalid by reason of prior art and prior public use, prior to Paulucci's alleged date of invention or more than one year before his filing date, or both.

14.

Defendant was entitled to judgment on its counterclaim.

15.

The District Court erred:

(a) in holding claim 1 of the patent in suit valid and infringed;

(b) in not holding such claim and each of the claims of the patent in suit invalid and not infringed;

(c) in not dismissing the complaint for want of equity, with costs to defendant;

(d) in signing and entering the Findings of Fact and Conclusions of Law herein; and the subsequent entry of an interlocutory decree in favor of the plaintiffs, holding claim 1 of the patent in suit valid and infringed and ordering an injunction and accounting;

(e) in dismissing defendant's counterclaim; and

(f) in awarding costs to plaintiffs.

16.

The District Court erred in the specific factual findings set forth in Findings of Fact 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25.

17.

The District Court erred in failing and refusing to find and adjudge that defendant has not infringed claims 2 and 3 of patent No. 2,679,281 in suit.

18.

The District Court erred in failing and refusing to find and adjudge that claims 2 and 3 of patent No. 2,679,281 in suit are invalid.

19.

The District Court erred in failing and refusing to find and adjudge that the hand-taping operations of the defendant do not infringe claim 1 of patent No. 2,679,281 in suit.

Dated: May 8, 1956.

HARRIS, KIECH, FOSTER
& HARRIS,
FORD HARRIS, JR.,
WALTON EUGENE TINSLEY,

/s/ By FORD HARRIS, JR.,
Attorneys for Appellant,
Oriental Foods, Inc.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 9, 1956. Paul P. O'Brien,
Clerk.

